CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 309

THE UNITED STATES, PETITIONER

vs.

ROBERT MORSS LOVETT

No. 310

THE UNITED STATES, PETITIONER

vs.

GOODWIN B. WATSON

No. 311

THE UNITED STATES, PETITIONER

vs.

WILLIAM E. DODD, Jr.

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

PETITIONS FOR CERTIORARI FILED FEBRUARY 5, 1946
CERTIORARI GRANTED MARCH 25, 1946

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 809

THE UNITED STATES, PETITIONER

vs.

ROBERT MORSS LOVETT

No. 810

THE UNITED STATES, PETITIONER

vs.

GOODWIN B. WATSON

No. 811

THE UNITED STATES, PETITIONER

vs.

WILLIAM E. DODD, JR.

ON PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS

INDEX

	Original	Print
Record from Court of Claims	1	1
History of proceedings in the case fo Robert Morss Lovett	1	1
Amended petition of Robert Morss Lovett	4	1
Petition of Goodwin B. Watson	11	7
Petition of William E. Dodd, Jr.	19	12
General traverses	27	17
Argument and submission	27	18
Special findings of fact	29	19
Conclusions of law	46	33
Opinion, Whaley, C. J.	46	33
Concurring opinion, Whitaker, J.	55	41
Concurring opinion, Jones, J.	57	42
Concurring opinion, Madden, J.	59	44
Judgment	65	48
Clerk's certificate [omitted in printing]	67	49
Order allowing certiorari		50

1 In the Court of Claims of the United States

No. 46026

ROBERT MORSS LOVETT

vs.

THE UNITED STATES

History of Proceedings

The original petition was filed on December 3, 1943.

On September 27, 1944, on motion made therefor, and allowed by the court, the plaintiff filed its amended petition which is as follows.

Amended Petition—Filed September 27, 1944

To the Honorable the Chief Justice and Associate Justices of the Court of Claims of the United States:

Plaintiff respectfully represents:

I

1. Plaintiff is a citizen of the United States and a resident of the Virgin Islands.

2. Plaintiff file this petition to recover from the United States an amount equivalent to his salary—base pay, including differential, plus overtime—in the sum of $2090.65, more or less, subject to exact computation, as compensation for the performance
2 of his regular duties as Executive Assistant to the Governor of the Virgin Islands from November 16, 1943, through March 13, 1944.

3. Plaintiff was commissioned the United States Government Secretary of the Virgin Islands on April 28, 1939, having been appointed to that office by the President pursuant to Section 21 of the Organic Act of the Virgin Islands. Act of June 22, 1936 (49 Stat. 1812, 48 U. S. Code, Sec. 1405t). Plaintiff was appointed to the office of Executive Assistant to the Governor of the Virgin Islands on August 26, 1943, by the Secretary of the Interior, pursuant to authority granted in Section 23 of the Act of June 22, 1936 (49 Stat. 1813, 48 U. S. Code, Sec. 1405v). Plaintiff entered on duty as such executive officer on October 12, 1943. The compensation for the position of Executive Assistant to the Governor of the Virgin Islands is fixed at a base rate of $4,600 per annum, plus a 25 per cent differential for service outside of the continental United States, as established by Regulations of the Department of

Interior issued January 20, 1943, pursuant to authority granted in the Act of July 3, 1930 (46 Stat. 1005, 5 U. S. Code, Sec. 678a), plus overtime, computed in accordance with the War Overtime Pay Act of 1943 (57 Stat. 75, 50 U. S. C. A., Appendix, Secs., 1401 and 1402). Plaintiff has faithfully performed all duties, and has faithfully met all responsibilities, imposed upon him as Executive Assistant to the Governor of the Virgin Islands, from October 12, 1943, through March 13, 1944.

4. Plaintiff was, from April 28, 1939, until his resignation on March 13, 1944, a duly appointed and acting officer in the executive branch of the federal government.

3 5. Harold L. Ickes is the duly appointed, qualified and acting Secretary of the Interior of the United States and as such is head of the Department of the Interior, and exercises general supervision and control over the executive branch of the government of the Virgin Islands, as provided by Rev. Stat., Sec. 437 (5 U. S. Code, Sec. 481); Rev. Stat., Sec. 442 (5 U. S. Code, Sec. 486); Rev. Stat., Sec. 441 as amended (5 U. S. Code, Sec. 485); and the Act of June 22, 1936 (49 Stat. 1812, 48 U. S. Code, Sec. 1405s et seq., as amended). As Secretary of the Interior, Mr. Ickes has the power of appointment and removal of various of the officers and employees of the United States in the executive branch of the government of the Virgin Islands, including the appointment of plaintiff to, and removal of plaintiff from, his position as Executive Assistant, pursuant to authority granted in the Act of June 22, 1936 (48 U. S. Code, Sec. 1405v). Said Secretary of the Interior, or someone acting on his behalf, also has the duty of signing all requisitions for the advance or payment of money, out of the Treasury, for expenditures upon business of the Department, including the expenditures for administration of the Virgin Islands, as provided by Rev. Stat., Sec. 444 as amended (5 U. S. Code, Sec. 487), and Act of June 22, 1936 (49 Stat. 1813, 48 U. S. Code, Sec. 1405v).

II

6. On February 9, 1943, The House of Representatives of the United States adopted House Resolution 105. Pursuant to this Resolution a Special Subcommittee of the Committee on Appropriations conducted hearings from April 9–15, 1943, in secret session to investigate certain charges made against, inter alia, plaintiff.

4 7. The Committee on Appropriations in House Report No. 448 (78th Cong., 1st Sess.), dated May 14, 1943, approved findings of the foregoing Special Subcommittee that plaintiff was "unfit to continue" in federal employment, and

acting further under Resolution 105, amended H. R. 2714 (Urgent Deficiency Appropriation Bill). This amendment, after having been rejected by the Senate (89 Cong. Rec. 5103), was restored with modifications in Conference (H. Rep. 661, 78th Cong., 1st Sess., July 3, 1943) and was enacted as Section 304 of the Urgent Deficiency Appropriation Act, 1943 (Public Law 132) on July 12, 1943. Section 304 of the Urgent Deficiency Appropriation Act, 1943, thus enacted provides:

"SEC. 304. No part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act, or (2) which is now, or which is hereafter made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States, shall be used, after November 15, 1943, to pay any part of the salary, or other compensation for the personal services, of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has been appointed by the President, by and with the advice and consent of the Senate: Provided, that this section shall not operate to deprive any such person of payment for leaves of absence or salary, or of any refund or reimbursement, which have accrued prior to November 15, 1943: Provided further, That this section shall not operate to deprive any such person of payment for services performed as a member of a jury or as a member of the armed forces of the United States nor any benefit, pension, or emolument resulting therefrom."

5. 8. By letter of November 23, 1943, Morris F. de Castro, Commissioner of Finance of the Virgin Islands and the officer authorized to certify the payment of salary to plaintiff, advised the Secretary of the Interior that in view of Section 304 of the Urgent Deficiency Appropriation Act, 1943, he would not certify for payment the salary of plaintiff after November 15, 1943.

9. By letter of November 26, 1943, Harold L. Ickes, Secretary of the Interior, wrote plaintiff as follows:

"MY DEAR MR. LOVETT: When you were last in Washington I discussed with you the implications of section 304 of the Urgent Deficiencies Act. During these conferences I urged, despite the prohibition, your staying on the job after November 15, for the reason that the limitations contained in section 304 are, in my opinion and in the opinion of my Solicitor, an unwarranted interference with my executive powers.

"I wish to repeat the request that you continue in the office of Executive Assistant to the Governor. Funds may not be available to pay your salary until the unconstitutional prohibition of the Urgent Deficiencies Act is declared invalid by the courts.

I am confident, however, that the prohibition will be so adjudged, and a principle fundamental to democratic government will be upheld.

"In no case are you to consider yourself discharged. You will continue to perform the duties of your office and to exercise all the authority conferred upon you by law.

"Sincerely yours,

"(S) HAROLD L. ICKES.
"*Secretary of the Interior.*"

6 10. On November 29, 1943, the Secretary of the Interior wrote the following letter to plaintiff:

"MY DEAR MR. LOVETT: The Commissioner of Finance of the Virgin Islands has advised me that in view of section 304 of the Urgent Deficiency Bill (Public Law 132, 78th Cong.) funds are not available to pay your salary after November 15, 1943.

"During the past four years you have won the respect and affection of all of the Virgin Islanders, and you have under very trying circumstances, served the Governments of the Virgin Islands and the United States with credit and distinction.

"If there were some appropriate way to avoid the effect of the provision of the Deficiency Act, you would, of course, receive your salary. I should like very much for you to continue in the office of Executive Assistant to the Governor. It would be most difficult for me to find someone to replace you. The matter, however, now is beyond my control. I made every effort to prevent the adoption of the prohibitive provisions of the bill. The action taken by Congress has been very disappointing to me. I hope that you will be successful in challenging the constitutionality of the measure which otherwise prevents the disbursing officers of the Government from paying you the salary for which you are rendering such valuable services.

"With my best wishes, I remain,

"Sincerely yours,

"(S) HAROLD L. ICKES.
"*Secretary of the Interior.*"

This letter plaintiff received in lieu of his pay for the period from November 16, 1943 through November 30, 1943. Plaintiff demanded that he be paid for the services rendered to the
7 United States as Executive Assistant to the Governor of the Virgin Islands from November 15, 1943, through March 13, 1944. This demand was refused.

11. Plaintiff, solely because of Section 304 of the Urgent Deficiency Appropriation Act, 1943, did not receive compensation

for the period from November 16, 1943, through March 13, 1944; nor has plaintiff ever received his pro rata annual base salary, plus differential and overtime, or any part thereof, for the services rendered during the period designated. Defendant solely because of Section 304 of the Urgent Deficiency Appropriation Act, 1943, refused and failed to pay plaintiff compensation for the period from November 16, 1943, through March 13, 1944; nor has defendant ever paid plaintiff his pro rata annual base salary, plus differential and overtime, or any part thereof, for the services rendered during the period designated.

Wherefore, plaintiff brings this suit.

III

12. Section 304 of the Urgent Deficiency Appropriation Act, 1943, is unlawful and unconstitutional in that it purports to deprive plaintiff of his right to compensation as a duly appointed and continuing executive officer of the United States Government, which right legally exists until such time as he shall have been lawfully relived of, or shall have voluntarily relinquished, that status.

13. Section 304 of the Urgent Deficiency Appropriation Act, 1943, is an unconstitutional invasion of the executive power of the President of the United States under Article II of the Constitution of the United States because the permanent bar to compensation from federal appropriations of any kind after November 15, 1943, except upon fulfillment of conditions imposed by Section 304, is an attempt by the Congress of the United States to effect legislative removal of plaintiff and to deprive him permanently of his status as a federal officer. The attempt by Section 304 to condition plaintiff's right to continued compensation on reappointment by the President with the approval of the Senate by November 15, 1943, is likewise an unconstitutional encroachment on the executive power of the President of the United States to appoint and remove executive officers, and does not in any way remove the taint of unconstitutionality from Section 304. Impeachment is the sole means by which the Congress may lawfully remove an officer of the federal government.

14. Section 304 of the Urgent Deficiency Appropriation Act, 1943, being directed specifically at plaintiff, is a bill of attainder and unconstitutional and void under Section 9 of Article I of the Constitution of the United States.

15. Section 304 of the Urgent Deficiency Appropriation Act, 1943, is unconstitutional and void in that it purports to terminate

plaintiff's status as an executive officer together with his right to compensation therefor and deprives plaintiff of his liberty and property without due process of law in violation of the Fifth Amendment to the Constitution. The proceedings before the Special Subcommittee of the House Committee on Appropriations, upon which the enactment of Section 304 was based, were secret and not public, and were conducted without opportunity for plaintiff to know what charges were to be made against him, to prepare a defense of any kind, to be represented by counsel, to produce witnesses in his behalf, to cross-examine witnesses, to confront his accusers, or to employ the compulsory process of the Committee in his behalf. Section 304 is arbitrary special legislation.

IV

16. Plaintiff avers that it is the unqualified ministerial duty of defendant, acting through Harold L. Ickes, Secretary of the Interior, his agents, assistants or subordinates, including the Commissioner of Finance of the Virgin Islands, to recognize the status of all duly appointed and continuing executive officers within the Department of the Interior and to certify the amounts necessary for expenditures upon the business of that Department, including compensation to the plaintiff for so long as he remained an officer within the Department.

17. Defendant, acting through Morris F. de Castro, Commissioner of Finance of the Virgin Islands, refused and failed to pay the plaintiff the amount of the claim herein sued upon solely because Morris F. de Castro believed that Section 304 compelled him to decline to perform his aforesaid ministerial duties.

18. Plaintiff avers that defendant now wrongfully and illegally withholds his salary for the period from November 16, 1943, through March 13, 1944, in the amount of $2,090.65, more or less, subject to exact computation, no part of which has been paid, and wrongfully and illegally refuses to pay the plaintiff the sum stated.

19. Plaintiff, as sole and absolute owner of the claim herein presented, has made no transfer or assignment of said claim or any part thereof, or any interest therein, and is justly entitled to the amount claimed herein from the United States, after allowing all just credits and offsets. He has at all times borne true allegiance to the Government of the United States and has not in any way aided, abetted or given encouragement to rebellion against the United States.

20. Plaintiff, therefore, prays judgment against the United States in the sum of $2,090.65, more or less, subject to exact computation.

ROBERT MORSS LOVETT.
By CHARLES A. HORSKY,
Attorney in Fact.

COVINGTON, BURLING, RUBLEE, ACHESON & SHORB,
701 Union Trust Building, Washington 5, D. C.,
Attorneys for Plaintiff.

[*Duly sworn to by Charles A. Horsky; jurat omitted in printing.*]

11 In the Court of Claims of the United States

No. 46027

GOODWIN B. WATSON, PLAINTIFF

vs.

THE UNITED STATES, DEFENDANT

Petition

(Filed Dec. 3, 1943)

To the Honorable the Chief Justice and Associate Justices of the Court of Claims of the United States:

Plaintiff respectfully represents:

I

1. Plaintiff is a citizen of the United States and a resident of Washington, District of Columbia.

2. Plaintiff files this petition to recover from the United States an amount equivalent to his salary—base pay, plus overtime—in the sum of $148.50, more or less, subject to exact computation, as compensation for the performance of his regular duties as Chief of the Analysis Division, Foreign Broadcast Intelligence Service, Federal Communications Commission, from November 16, 1943, through November 21, 1943.

12 3. Plaintiff was appointed Chief of the Analysis Division, Foreign Broadcast Intelligence Service, Federal Communications Commission, on November 16, 1941, by the Federal Communications Commission in the exercise of its authority to appoint a director for each division granted by Section 4 of the

Federal Communications Act of 1934 (48 Stat. 1066 as amended, 47 U. S. Code, Sec. 154 (f) (1)). The base pay for the position of Chief of the Analysis Division is $6500 per year, which is below the maximum salary fixed by Section 4 of the Federal Communications Act of 1934 for such position. Overtime compensation is payable in addition thereto, computed in accordance with the War Overtime Pay Act of 1943, May 7, 1943 (57 Stat. 75, 50 U. S. C. A., Appendix, Secs. 1401 and 1402). Plaintiff has faithfully performed all duties and has faithfully met all responsibilities, imposed upon him as Chief of the Analysis Division, Foreign Broadcast Intelligence Service, Federal Communications Commission, from November 16, 1941, through November 21, 1943.

4. Plaintiff has been at all times since November 16, 1941, and continues to be, a duly appointed officer in the executive branch of the federal government.

5. The Federal Communications Commission has general supervision and control over the independent agency which it heads and which is within the executive branch of the government. It has the power of appointment and removal of various of the officers and employees necessary in the execution of its functions, as provided in the Communications Act of 1934 (48 Stat. 1066 as amended, 47 U. S. Code, Sec. 154 (f) (1)), including the power of appointment and removal of plaintiff. T. J. Slowie is the duly appointed, qualified and acting Secretary of the Federal Communications Commission. As Secretary of the Commission, T. J. Slowie, or someone acting on his behalf, is authorized to
13 approve before presentation for payment itemized vouchers for all expenditures of the Federal Communications Commission which may be necessary for the execution of its functions, including compensation to plaintiff, and which may be appropriated for by Congress, as provided by the Communications Act of 1934 (48 Stat. 1066, as amended, 47 U. S. Code, Sec. 154 (g)).

II

6. On February 9, 1943, The House of Representatives of the United States adopted House Resolution 105. Pursuant to this Resolution, a Special Subcommittee of the Committee on Appropriations conducted hearings from April 9–15, 1943, in secret session, to investigate certain charges made against, inter alia, plaintiff.

7. The Committee on Appropriations in House Report No. 448 (78th Cong., 1st Sess.), dated May 14, 1943, approved findings of the foregoing Special Subcommittee that plaintiff was "unfit to continue" in federal employment, and, acting further under Resolution 105, amended H. R. 2714 (Urgent Deficiency Appro-

priation Bill). This amendment, after having been rejected by the Senate (89 Cong. Rec. 5103), was restored with modifications in Conference (H. Rep. 661, 78th Cong., 1st Sess., July 3, 1943) and was enacted as Section 304 of the Urgent Deficiency Appropriation Act, 1943 (Public Law 132) on July 12, 1943. Section 304 of the Urgent Deficiency Appropriation Act, 1943, thus enacted provides:

"SEC. 304. No part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act; or (2) which is now, or which is hereafter made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States, shall be used, after November 15, 1943,

to pay any part of the salary, or other compensation for the
14 personal services, of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has been appointed by the President, by and with the advice and consent of the Senate: Provided, That this section shall not operate to deprive any such person of payment for leaves of absence of salary, or of any refund or reimbursement, which have accrued prior to November 15, 1943; Provided further, That this section shall not operate to deprive any such person of payment for services performed as a member of a jury or as a member of the armed forces of the United States nor any benefit, pension, or emolument resulting therefrom."

8. On November 22, 1943, T. J. Slowie, Secretary of the Federal Communications Commission, in which capacity he acts as certifying officer for the Commission, wrote the following letter to the plaintiff:

"DEAR MR. WATSON: The Commission's records show that you have been on active duty with the Federal Communications Commission from November 7th through November 21st. Since the position which you hold pays a base salary of $6,500 per annum, your compensation for this pay period, with overtime, would ordinarily be $297.01. However, in your case there is a provision of law which makes it impossible to pay you the full sum to which you would otherwise be entitled.

"Section 304 of Public Law 132, 78th Congress, provides as follows:

[Text of Section 304, already set out in paragraph 7 of Petition, is here omitted.]

"Because of this provision, it is possible to compensate you only for your services from November 7th through November 15, 1943, and your compensation for this period with overtime is $178.21. Accordingly, after adjustment of tax deduction $23.60 and retirement deduction $8.13, there is enclosed a check for $146.48.

"If you desire to avail yourself of the benefits of the pro-
15 viso which preserves your right to receive compensation for

annual leave accrued prior to November 15, 1943, you should file an application for leave in the usual manner.

"Very truly yours,

"(S) T. U. Slowie,
T. U. Slowie,
Secretary."

This letter plaintiff received in lieu of his pay for the period from November 16, 1943, through November 21, 1943. Plaintiff demanded that he be paid for the services rendered to the United States as Chief of the Analysis Division, Foreign Broadcast Intelligence Service, from November 16, 1943, through November 21, 1943. This demand was refused.

9. Plaintiff, solely because of Section 304 of the Urgent Deficiency Appropriation Act, 1943, did not receive compensation for the period from November 16, 1943, through November 21, 1943; nor has plaintiff ever received his pro rata annual base salary, with overtime, or any part thereof, for the services rendered during the period designated. Defendant, solely because of Section 304 of the Urgent Deficiency Appropriation Act, 1943, refused and failed to pay plaintiff compensation for the period from November 16, 1943, through November 21, 1943; nor has defendant ever paid plaintiff his pro rata annual base salary, with overtime, or any part thereof, for the services rendered during the period designated.

Wherefore, the plaintiff brings this suit.

III

10. Section 304 of the Urgent Deficiency Appropriation Act, 1943, is unlawful and unconstitutional in that it purports to deprive plaintiff of his right to compensation as a duly appointed and continuing executive officer of the United States Government, which right legally exists until such time as he shall have been lawfully relieved of, or shall have voluntarily reinquished, that status;

11. Section 304 of the Urgent Deficiency Appropriation Act, 1943, is an unconstitutional invasion of the executive power of the President of the United States under Article II of the Constitution of the United States because the permanent bar to compensation from federal appropriations of any kind after November 15, 1943, except upon fulfillment of conditions imposed by Section 304, is an attempt by the Congress of the United States to effect legislative removal of plaintiff and to deprive him permanently of his status as a federal officer. The attempt by Section 304 to condition plaintiff's right to continued compensation on reappoint-

ment by the President with the approval of the Senate by November 15, 1943, is likewise an unconstitutional encroachment on the executive power of the President of the United States to appoint and remove executive officers, and does not in any way remove the taint of unconstitutionality from Section 304. Impeachment is the sole means by which the Congress may lawfully remove an officer of the federal government.

12. Section 304 of the Urgent Deficiency Appropriation Act, 1943, being directed specifically at plaintiff, is a bill of attainder and unconstitutional and void under Section 9 of Article I of the Constitution of the United States.

13. Section 304 of the Urgent Deficiency Appropriation Act, 1943, is unconstitutional and void in that it purports to terminate plaintiff's status as an executive officer together with his right to compensation therefor and deprives the plaintiff of his liberty and property without due process of law in violation of the Fifth Amendment to the Constitution. The proceedings before the Special Subcommittee of the House Committee on Appropriations, upon which the enactment of Section 304 was based, were secret and not public, and were conducted without opportunity for plaintiff to know what charges were to be made against him, to prepare a defense of any kind, to be represented by counsel, to produce witnesses in his behalf, to cross-examine witnesses, to confront his accusers, or to employ the compulsory process of the Committee in his behalf. Section 304 is arbitrary special legislation.

17

IV

14. Plaintiff avers that it is the unqualified ministerial duty of defendant, by its duly authorized agent, T. J. Slowie, Secretary and certifying officer for the Federal Communications Commission, or someone acting on his behalf, to recognize the status of all duly appointed and continuing executive officers within the Federal Communications Commission and to certify and to pay the amounts necessary for expenditures upon the business of that independent agency, including compensation to the plaintiff for so long as he remains an officer within that agency.

15. T. J. Slowie, acting for the defendant as Secretary of the Federal Communications Commission, refused and failed to certify for payment, or to pay, to plaintiff the amount of the claim herein sued upon solely because, despite its unconstitutionality, he believed that Section 304 compelled him to decline to perform his aforesaid ministerial duties unless and until Section 304 has been declared unconstitutional by judicial decision.

16. Plaintiff avers that defendant now wrongfully and illegally withholds his salary for the period from November 16, 1943,

through November 21, 1943, in the amount of $148.50, more or less, subject to exact computation, no part of which has been paid, and wrongfully and illegally refuses to pay the plaintiff the sum stated.

17. Plaintiff, as sole and absolute owner of the claim herein presented, has made no transfer or assignment of said claim or any part thereof, or any interest therein, and is justly entitled to the amount claimed herein from the United States, after allowing all just credits and offsets. He has at all times borne true allegiance to the Government of the United States and has not in any way aided, abetted or given encouragement to rebellion against the United States.

18. Plaintiff, therefore, prays judgment against the United States in the sum of $148.50, more or less, subject to exact computation.

GOODWIN B. WATSON, *Plaintiff.*

COVINGTON, BURLING, RUBLEE, ACHESON & SHORB,
701 Union Trust Building, Washington 5, D. C.,
Attorneys for Plaintiff.

[*Duly sworn to by Goodwin B. Watson; jurat omitted in printing.*]

19. In the Court of Claims of the United States

No. 46028

WILLIAM E. DODD, JR., PLAINTIFF

vs.

THE UNITED STATES, DEFENDANT

Petition

(Filed Dec. 3, 1943)

To the Honorable the Chief Justice and Associate Justices of the Court of Claims of the United States:

Plaintiff respectfully represents:

I

1. Plaintiff is a citizen of the United States and a resident of Arlington, Virginia.

2. Plaintiff files this petition to recover from the United States an amount equivalent to his salary—base pay, plus overtime—in the sum of $79.75, more or less, subject to exact computation, as

compensation for the performance of his regular duties as Assistant News Editor, Federal Communications Commission, from November 16, 1943, through November 21, 1943.

20 3. Plaintiff was appointed Assistant News Editor, Foreign Broadcast Intelligence Service, Federal Communications Commission on December 1, 1941, by the Federal Communications Commission in the exercise of its authority to appoint such employees granted by Section 4 of the Federal Communications Act of 1934 (48 Stat. 1066 as amended, 47 U. S. Code, Sec. 154 (f) (1)). The base salary for the position of Assistant News Editor is $3,200 per year, which base rate, as provided by Section 4 of the Federal Communications Act of 1934, has been fixed by the Civil Service Commission. Overtime compensation is payable in addition thereto, computed in accordance with the War Overtime Pay Act of 1943, May 7, 1943 (57 Stat. 75, 50 U. S. C. A., Appendix, Secs. 1401 and 1402). Plaintiff has faithfully performed all duties, and has faithfully met all responsibilities, imposed upon him as Assistant News Editor, Foreign Broadcast Intelligence Service, Federal Communications Commission, from December 1, 1941, through November 21, 1943.

4. Plaintiff has been at all times since December 1, 1941, and continues to be, a duly appointed officer in the executive branch of the federal government.

5. The Federal Communications Commission has general supervision and control over the independent agency which it heads and which is within the executive branch of the government. It has the power of appointment and removal of various of the officers and employees necessary in the execution of its functions, as provided in the Communications Act of 1934 (48 Stat. 1066 as amended, 47 U. S. Code, Sec. 154 (f) (1)), including the power of appointment and removal of plaintiff. T. J. Slowie is the duly appointed, qualified and acting Secretary of the Federal Communications Commission. As Secretary of the Commission, T. J. Slowie, or someone acting on his behalf, is

21 authorized to approve before presentation for payment itemized vouchers for all expenditures of the Federal Communications Commission, which may be necessary for the execution of its functions, including compensation to plaintiff, and which may be appropriated for by Congress, as provided by the Communications Act of 1934 (48 Stat. 1066 as amended, 47 U. S. Code, Sec. 154 (g)).

II

6. On February 9, 1943, the House of Representatives of the United States adopted House Resolution 105. Pursuant to this Resolution, a Special Subcommittee of the Committee on Appro-

priations conducted hearings from April 9–15, 1943, in secret session, to investigate certain charges made against, inter alia, plaintiff.

7. The Committee on Appropriations in House Report No. 448 (78th Cong., 1st Sess.), dated May 14, 1943, approved findings of the foregoing Special Subcommittee that plaintiff was "unfit to continue" in federal employment, and, acting further under Resolution 105, amended H. R. 2714 (Urgent Deficiency Appropriation Bill). This amendment, after having been rejected by the Senate (89 Cong. Rec. 5103), was restored with modifications in Conference (H. Rep. 661, 78th Cong., 1st Sess., July 3, 1943) and was enacted as Section 304 of the Urgent Deficiency Appropriation Act, 1943 (Public Law 132) on July 12, 1943. Section 304 of the Urgent Deficiency Appropriation Act, 1943, thus enacted provides:

"SEC. 304. No part of any appropriation, allocation, of fund (1) which is made available under or pursuant to this Act, or (2) which is now, or which is hereafter made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States, shall be used, after November 15, 1943, to pay any part of the salary, or other com-
22 pensation for the personal services, of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has been appointed by the President, by and with the advice and consent of the Senate: Provided, That this section shall not operate to deprive any such person of payment for leaves of absence or salary, or of any refund or reimbursement, which have accrued prior to November 15, 1943; Provided further, That this section shall not operate to deprive any such person of payment for services performed as a member of a jury or as a member of the armed forces of the United States nor any benefit, pension, or emolument resulting therefrom."

8. On November 22, 1943, T. J. Slowie, Secretary of the Federal Communications Commission, in which capacity he acts as the certifying officer of the Commission, wrote the following letter to the plaintiff:

"DEAR MR. DODD: The Commission's records shows that you have been on active duty with the Federal Communications Commission from November 7th through November 21st. Since the position which you hold pays a base salary of $3,200 per annum, your compensation for this pay period, with overtime, would ordinarily be $159.51. However, in your case there is a provision of law which makes it impossible to pay you the full sum to which you would otherwise be entitled.

"Section 304 of Public Law 132; 78th Congress, provides as follows:

[Text of Section 304, already set out in paragraph 7 of Petition, is here omitted.]

"Because of this provision, it is possible to compensate you only for your services from November 7th through November 15, 1943, and your compensation for this period with overtime is $96.51. Accordingly, after adjustment of tax deduction $5.00, and retirement deduction $4.00, there is enclosed a check for $87.51.

"If you desire to avail yourself of the benefits of the proviso which preserves your right to receive compensation for annual leave accrued prior to November 15, 1943, you should file an application for leave in the usual manner.

"Very truly yours,

"(S) T. J. Slowie,
T. J. Slowie,
Secretary."

This letter plaintiff received in lieu of his pay for the period from November 16, 1943, through November 21, 1943. Plaintiff demanded that he be paid for the services rendered to the United States as Assistant News Editor, Foreign Broadcast Intelligence Service, from November 16, 1943, through November 21, 1943. This demand was refused.

9. Plaintiff, solely because of Section 304 of the Urgent Deficiency Appropriation Act, 1943, did not receive compensation for the period from November 16, 1943, through November 21, 1943; nor has plaintiff ever received his pro rata annual base salary, with overtime, or any part thereof, for the services rendered during the period designated. Defendant, solely because of Section 304 of the Urgent Deficiency Appropriation Act, 1943, refused and failed to pay plaintiff compensation for the period from November 16, 1943, through November 21, 1943; nor has defendant ever paid plaintiff his pro rata annual base salary, with overtime; or any part thereof, for the services rendered during the period designated.

Wherefore, the plaintiff brings this suit.

III

10. Section 304 of the Urgent Deficiency Appropriation Act, 1943, is unlawful and unconstitutional in that it purports to deprive plaintiff of his right to compensation as a duly appointed and continuing executive officer of the United States Government, which right legally exists until such time as he

shall have been lawfully relieved of, or shall have voluntarily relinquished, that status.

11. Section 304 of the Urgent Deficiency Appropriation Act, 1943, is an unconstitutional invasion of the executive power of the President of the United States under Article II of the Constitution of the United States because the permanent bar to compensation from federal appropriations of any kind after November 15, 1943, except upon fulfillment of conditions imposed by Section 304, is an attempt by the Congress of the United States to effect legislative removal of plaintiff and to deprive him permanently of his status as a federal officer. The attempt by Section 304 to condition plaintiff's right to continued compensation on reappointment by the President with the approval of the Senate by November 15, 1943, is likewise an unconstitutional encroachment on the executive power of the President of the United States to appoint and remove executive officers, and does not in any way remove the taint of unconstitutionality from Section 304. Impeachment is the sole means by which the Congress may lawfully remove an officer of the federal government.

12. Section 304 of the Urgent Deficiency Appropriation Act, 1943, being directed specifically at plaintiff, is a bill of attainder and unconstitutional and void under Section 9 of Article I of the Constitution of the United States.

13. Section 304 of the Urgent Deficiency Appropriation Act, 1943, is unconstitutional and void in that it purports to terminate plaintiff's status as an executive officer together with his right to compensation therefor and deprives the plaintiff of his liberty and property without due process of law in violation of the Fifth Amendment to the Constitution. The proceedings before the Special Subcommittee of the House Committee on Appropriations, upon which the enactment of Section 304 was based, were secret and not public, and were conducted without opportunity for plaintiff to know what charges were to be made against him, to prepare a defense of any kind, to be represented by counsel, to produce witnesses in his behalf, to cross-examine witnesses, to confront his accusers, or to employ the compulsory process of the Committee in his behalf. Section 304 is arbitrary special legislation.

IV

14. Plaintiff avers that it is the unqualified ministerial duty of defendant, acting through its duly authorized agent, T. J. Slowie, Secretary and certifying officer for the Federal Communications Commission, to recognize the status of all duly

pointed and continuing executive officers within the Federal Communications Commission and to certify the amounts necessary for expenditures upon the business of that independent agency, including compensation to the plaintiff for so long as he remains an officer within that agency.

15. T. J. Slowie, acting for the defendant as Secretary of the Federal Communications Commission, refused and failed to certify for payment to plaintiff the amount of the claim herein sued upon solely because, despite its unconstitutionality, T. J. Slowie believed that Section 304 compelled him to decline to perform his aforesaid ministerial duties unless and until Section 304 has been declared unconstitutional by judicial decision.

16. Plaintiff avers that defendant now wrongfully and illegally withholds his salary for the period from November 16, 1943, through November 21, 1943 in the amount of $79.75, more or less, subject to exact computation, no part of which has been paid, and wrongfully and illegally refuses to pay the plaintiff the sum stated:

26 17. Plaintiff, as sole and absolute owner of the claim herein presented, has made no transfer or assignment of said claim or any part thereof, or any interest therein, and is justly entitled to the amount claimed herein from the United States, after allowing all just credits and offsets. He has at all times borne true allegiance to the Government of the United States and has not in any way aided, abetted or given encouragement to rebellion against the United States.

18. Plaintiff, therefore, prays judgment against the United States in the sum of $79.75, more or less, subject to exact computation.

WILLIAM E. DODD, JR.,
Plaintiff.

COVINGTON, BURLING, RUBLEE, ACHESON & SHORB,
701 Union Trust Building, Washington 5, D. C.
Attorneys for Plaintiff.

[*Duly sworn to by William E. Dodd, Jr.; jurat omitted in printing.*]

27 *General traverse.*

Filed Nov. 6, 1944

On November 6, 1944, a general traverse was filed to the amended petition in case No. 46026 which is as follows:

And now comes the Attorney-General, on behalf of the United States, and answering the amended petition of the claimant herein,

denies each and every allegation therein contained; and asks judgment that the amended petition be dismissed.

FRANCIS M. SHEA,
Assistant Attorney General.

DBM.
EEE.

General traverses

Filed Feb. 7, 1944

On February 7, 1944, general traverses were filed in cases Nos. 46027 and 46028 which are as follows:

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained: and asks judgment that the petition be dismissed.

FRANCIS M. SHEA,
Assistant Attorney General.

EEE.

Argument and submission of case

On June 6, 1945, the cases were argued and submitted together on merits by Mr. Charles A. Horsky for plaintiffs, by Mr. Rawlings Ragland for the Attorney General, and by Mr. John C. Gall for the Congress of the United States.

29 *Special findings of fact, conclusions of law and opinion of the court by Whaley, Ch. J., concurring opinions by Whitaker, J., Jones J., and Madden J.*

Filed November 5, 1945

Mr. Charles A. Horsky for the plaintiffs. Mr. Edward B. Burling, Miss Amy Ruth Mahin, and Covington, Burling, Rublee, Acheson & Shorb, were on the briefs.

Mr. Rawlings Ragland, with whom was Mr. Assistant Attorney General Francis M. Shea, for the Attorney General. Messrs. Donald B. MacGuineas and Henry Weihofen were on the brief.

Mr. John C. Gall for the Congress of the United States. Messrs. Dean Hill Stanley, William F. Howe, Karl M. Dollak, Jos. G. Butts, Jr., John E. Ritzert, and Clark M. Robertson were on the briefs.

This case having been heard by the Court of Claims, the court, upon the stipulation entered into between the parties, makes the following

Special findings of fact

No. 46026. Robert Morss Lovett v. The United States.

1. Plaintiff, Robert Morss Lovett, is a citizen of the United States and at the time of the filing of this suit was a resident of the Virgin Islands.

2. Plaintiff was commissioned the United States Government Secretary of the Virgin Islands on April 28, 1939, having been appointed by the President pursuant to Section 21 of the Organic Act of the Virgin Islands (Act of June 22, 1936). Plaintiff took the oath of office on July 17, 1939. On August 26, 1943, plaintiff was appointed Executive Assistant to the Governor of the Virgin Islands by the Secretary of Interior, pursuant to authority granted in Section 23 of the Organic Act of the Virgin Islands (Act of June 22, 1936) to succeed Mr. W. M. Freeman, who had resigned. Plaintiff entered on duty as such Executive Assistant on October 12, 1943.

3. The compensation for the position of Executive Assistant to the Governor of the Virgin Islands is fixed at a base rate of $4,600 per annum plus a 25 percent differential for services outside of the Continental United States, plus overtime computed in accordance with the War Overtime Pay Act of 1943. Plaintiff has performed the duties incident to the position of Executive Assistant to the Governor of the Virgin Islands from October 12, 1943, through March 13, 1944. On March 6, 1944, Harold L. Ickes, Secretary of the Interior wrote plaintiff as follows:

"My Dear Mr. Lovett: Last November, I authorized you to continue your services to the Government after November 15, in spite of the provision of section 304 of the Urgent Deficiency Act (Public Law 132, 78th Cong.), which prohibited the use of appropriated funds for the payment of your salary. The principal purpose of that authorization was to make it possible for you to test by legal action the validity of section 304. You have continued to serve the Government without receiving your salary since November 15, 1943.

"As you no doubt know, this Department has been bitterly criticized by the Congress in recent months for continuing to accept them after you had worked for a period which would permit you to test the constitutionality of Congressional action. In these circumstances I have concluded that I have no alternative but to request your resignation.

"The matter is now before the Court of Claims, and I believe that the position taken by this Department and by yourself will be vindicated, in which case you will receive all the salary which you have earned. I want again to acknowledge the respect and affection

in which you are held by the people of the Virgin Islands and to assure you of my own highest regards and esteem.

"With best wishes to you and Mrs. Lovett, I am

"Sincerely yours,

"(S) HAROLD L. ICKES,
"Secretary of the Interior."

31 On March 13, 1944, plaintiff wrote Harold L. Ickes, Secretary of the Interior, as follows:

"MY DEAR MR. ICKES: In accordance with your request, I am sending you my resignation as Executive Assistant to the Governor of the Virgin Islands, effective at the close of March 30, 1944. I do so with regret because of my pleasant relations during the past five years with the peoples of the Virgin Islands. I thank you for the opportunity of living among them and serving them in conjunction with my colleagues of all departments whose friendship and cooperation will always be a happy memory. For your own encouragement and support, and that of the Department, I shall always be profoundly grateful. It is obvious that the Department should not bear any longer the burden of the personal hostility toward me of members of Congress, and that I can best serve the people of the Virgin Islands by leaving them.

"Sincerely yours,

"(S) ROBERT M. LOVETT."

4. Harold L. Ickes is the duly appointed qualified and acting Secretary of the Interior of the United States. As such he is head of the Department of the Interior and exercises general supervision and control over the Executive Branch of the Government of the Virgin Islands. As Secretary of the Interior, he has the power of appointment of various of the executive and administrative officers and employees of the United States in the Executive Branch of the Government of the Virgin Islands, including the appointment of plaintiff to his position as Executive Assistant, pursuant to authority granted in the Organic Act of the Virgin Islands (Act of June 22, 1936). As Secretary of the Interior, he or someone acting on his behalf, has the duty of signing all requisitions for the advance or payment of money out of the Treasury for expenditures of business of the Department, including expenditures for the administration of the Virgin Islands.

5. On February 9, 1943, the House of Representatives of the United States adopted House Resolution 105. Pursuant to this Resolution, a Special Sub-Committee of the Committee on Appropriations was appointed, and on March 23, 1943, the Sub-Committee adopted Rules of Procedure. These rules were first published in the Congressional Record of June 2, 1943 (Congressional

Record, 78th Congress, 1st Session, Appendix, p. 7062). The
32 Sub-Committee conducted hearings from April 9 to April 15, 1943, to investigate certain charges made, *inter alia*, against plaintiff. The hearings before the Sub-Committee were held in executive session. Plaintiff was invited by letter handed him on April 14 to appear in person before the Sub-Committee on April 15 and make such statements or explanations under oath as he might desire, and to answer such questions as might be propounded. The invitation advised plaintiff that if he was unacquainted with the charges and allegations concerning him a copy would be furnished upon request. No such request was made by plaintiff. Plaintiff was shown at the hearing 54 charges made against him by the Committee on Un-American Activities of the House of Representatives, 78th Congress, 1st Session, acting pursuant to H. R. 282. The evidence and other materials gathered during the course of prior investigations by the Federal Bureau of Investigation, by the Committee on Un-American Activities, and by others, which were considered by the Sub-Committee in connection with plaintiff's case, were and are confidential, except that the charges formulated by the Committee on Un-American Activities were shown to plaintiff at the hearing as above stated. The Solicitor of the Department of Interior, on the day before the hearing on April 15, 1943, requested permission to appear at the hearing before the Sub-Committee with plaintiff. He was advised by the Committee that his request to appear as an observer for the Department of the Interior would be considered. On the following day, the Solicitor was informed that the policy of the Sub-Committee, already formulated in prior hearings involving persons connected with the Federal Communications Commission, was to hold its hearings without any persons other than the Sub-Committee, its staff, and the witness being present. The plaintiff was not proffered, nor did he request, the opportunity to produce witnesses in his own behalf or to use the compulsory processes of the Sub-Committee to require other persons to appear before it to testify or to submit to cross-examination, nor were any witnesses called or heard by the Sub-Committee on behalf of plaintiff.

33 No witnesses, other than plaintiff, testified before the Sub-Committee with respect to plaintiff. Plaintiff was questioned with respect to his membership and activity in various organizations and with respect to various writings, speeches and activities on his part. Plaintiff was given at the hearing full opportunity to make any statements or explanations he desired with respect to the subject-matter of the investigation. At the close of the hearing, plaintiff was also accorded an opportunity to make any statements he wished, but registered with the Sub-Committee no complaint as to its procedure or its treatment of him.

6. On May 14, 1943, the Special Sub-Committee of the Committee on Appropriations reported to the Committee on Appropriations. On May 14, 1943, the Committee on Appropriations submitted a report (H. Rep. No. 448, 78th Cong., 1st Sess.) approving the findings of the said Special Sub-Committee and proposing an amendment to the Urgent Deficiency Appropriation Act, 1943 (H. R. 2714). Section 304 of the Urgent Deficiency Appropriation Act of 1943 of July 12, 1943, as finally enacted (Public 132), provides as follows:

"SEC. 304. No part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act or (2) which is now, or which is hereafter made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States, shall be used, after November 15, 1943, to pay any part of the salary, or other compensation, for the personal services, of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has been appointed by the President, by and with the advice and consent of the Senate: Provided, That this section shall not operate to deprive any such person of payment for leaves of absence or salary, or of any refund or reimbursements, which have accrued prior to November 15, 1943: Provided further, That this section shall not operate to deprive any such person of payment for services performed as a member of a jury or as a member of the armed forces of the United States nor any benefit, pension, or emolument resulting therefrom."

The President did not appoint plaintiff under Section 304.

7. By letter of November 23, 1943, Morris F. de Castro, Commissioner of Finance of the Virgin Islands and the officer authorized to certify the payment of salary to plaintiff, advised the Secretary of the Interior that in view of Section 304 of the Urgent Deficiency Appropriation Act of 1943, he would not certify for payment the salary of plaintiff after November 15, 1943.

8. By letter of November 26, 1943, Harold L. Ickes, Secretary of the Interior, wrote plaintiff as follows:

"MY DEAR MR. LOVETT: When you were last in Washington I discussed with you the implications of section 304 of the Urgent Deficiencies Act. During these conferences I urged, despite the prohibition, your staying on the job after November 15, for the reason that the limitations contained in section 304 are, in my opinion and in the opinion of my Solicitor, an unwarranted interference with my executive powers.

"I wish to repeat the request that you continue in the office of Executive Assistant to the Governor. Funds may not be available to pay your salary until the unconstitutional prohibition of

the Urgent Deficiencies Act is declared invalid by the courts. I am confident, however, that the prohibition will be so adjudged, and a principle fundamental to democratic government will be upheld.

"In no case are you to consider yourself discharged. You will continue to perform the duties of your office and to exercise all the authority conferred upon you by law.

"Sincerely yours,

"(S) HAROLD L. ICKES,
"*Secretary of the Interior.*"

9. On November 29, 1943, the Secretary of the Interior wrote the following letter to plaintiff:

"My Dear Mr. Lovett: The Commissioner of Finance of the Virgin Islands has advised me that, in view of section 304 of the Urgent Deficiency Bill (Public Law 132, 78th Cong.), funds are not available to pay your salary after November 15, 1943.

"During the past four years you have won the respect and affection of all of the Virgin Islanders, and you have, under very trying circumstances, served the Governments of the Virgin Islands and the United States with credit and distinction.

"If there were some appropriate way to avoid the effect of the provision of the Deficiency Act, you would, of course, receive your salary. I should like very much for you to continue in the office of Executive Assistant to the Governor. It would be most difficult for me to find someone to replace you. The matter, however, now is beyond my control. I made every effort to prevent the adoption of the prohibitive provisions of the bill. The action taken by Congress has been very disappointing to me. I hope that you will be successful in challenging the constitutionality of the measure which otherwise prevents the disbursing officers of the Government from paying you the salary for which you are rendering such valuable services.

"With my best wishes, I remain,

"Sincerely yours,

"(S) HAROLD L. ICKES,
"*Secretary of the Interior.*"

Plaintiff demanded that he be paid for the services rendered to the United States as Executive Assistant to the Governor of the Virgin Islands from November 15, 1943, through March 13, 1944. This demand was refused.

10. Plaintiff, because of Section 304 of the Urgent Deficiency Appropriation Act of 1943 and the fact that the President did not appoint him thereunder, has not received compensation from November 15, 1943, through March 13, 1944, nor has plaintiff ever

received his pro rata annual base salary, plus differential and overtime, or any part thereof, for the services rendered during that period. The defendant, acting through Harold L. Ickes, Secretary of the Interior, his agents, assistants or subordinates, and solely because of the operation of Section 304 of the Urgent Deficiency Appropriations Act of 1943 and the fact that the President did not appoint him thereunder, has refused and failed to pay to plaintiff any compensation for the period from November 15, 1943, through March 13, 1944, nor has the defendant ever paid plaintiff his pro rata base salary, plus differential and overtime, or any part thereof, for the services rendered during that period. The amount which has not been paid to plaintiff, and which has been withheld solely because of the operation of said Section 304 and the fact that the President did not appoint him thereunder, is $1,596.40.

No. 46827. Goodwin B. Watson v. The United States.

1. Plaintiff, Goodwin B. Watson, is a citizen of the United States and at the time of the filing of this suit was a resident of Washington, District of Columbia.

2. Plaintiff was appointed Chief of the Analysis Division, Foreign Broadcast Intelligence Service, Federal Communications Commission, on November 16, 1941, by the Federal Communications Commission in the exercise of its authority granted by Section 4 of the Federal Communications Act of 1934. Plaintiff took the oath of office on November 16, 1941.

3. Since October 20, 1942, the compensation for the position of Chief of the Analysis Division has been fixed at a base rate of $6,500 per year, plus, since May 1, 1943, overtime computed in accordance with the War Overtime Pay Act of 1943. Plaintiff has performed the duties incident to the position of Chief of the Analysis Division, Foreign Broadcast Intelligence Service, Federal Communications Commission, from November 16, 1941, through November 21, 1943. On May 2, 1944, plaintiff wrote to Dr. Robert D. Leigh, Director of the Foreign Broadcast Intelligence Service, Federal Communications Commission, as follows:

"DEAR MR. LEIGH: As I understand it, the reduction in appropriation for the Foreign Broadcast Intelligence Service makes necessary the elimination of the Analysis Division and the absorption of some of its work by other groups and other agencies. That seems to me to mark the termination of the work which I came to Washington to do and is hence an occasion on which I submit my resignation.

"In this last official document, I want to express to you, to the other administrative officers, and to the Commissioners and Chairman of the Federal Communications Commission my warm appreciation for the intelligent and courageous support which

they give to the war effort, to the FBI, to our Navy, and to me personally. I am glad to have had a little part in what I believe was a helpful war service, but I shall treasure as the most valuable part of my Washington experience the friends I have made here and the opportunity to work along with my fellow officials in the Federal Communications Commission.

"Cordially yours,

"(S) Goodwin Watson
Goodwin Watson"

On May 3, 1944, Mr. Lovett replied as follows:

"My dear Goodwin: I have your letter of May 2nd [sic] tendering your resignation as Chief of the Analysis Division of the Foreign Broadcast Intelligence Service.

"It is true that the position which you left and which was kept vacant for you has been eliminated so that there is no practical reason for continuance of you on the pay rolls of the FCC. Your resignation coming in this way makes it very clear cut that the act is voluntary.

"From the point of view of good governmental operation and the prosecution of the war effort, I would like to refuse your resignation with double black ridges—the first that would report for the detriment to the project's work by your enforced leave of absence due to the act of Congress. The second would report against the hindrance to the war effort by the reduction in the FBIS appropriation.

"Sincerely yours,

"(S) Robert D. Lovett"

On May 24, 1944, plaintiff received a notification from the Director of Personnel of the Federal Communications Commission that his resignation had become effective on May 21, 1944.

4. The Federal Communications Commission has general supervision and control over the agency which it holds. It has the power of appointment of various of the officers and employees necessary in the execution of its functions, provided in the Communications Act of 1934, including the power of appointment of plaintiff. T. J. Slowie is the duly appointed, qualified and acting Secretary of the Commission and as such T. J. Slowie or someone acting on his behalf, is authorized to approve before presentation for payment itemized vouchers for all expenditures of the Commission which may be necessary for the execution of its functions, including compensation to plaintiff, as provided by the Communications Act of 1934.

5. On February 9, 1943, the House of Representatives of the United States adopted House Resolution 105. Pursuant to this

Resolution, a Special Sub-Committee of the Committee on Appropriations was appointed, and on March 23, 1943, the Sub-Committee adopted Rules of Procedure. These Rules were first published in the Congressional Record of June 2, 1943 (Congressional Record, 78th Congress, 1st Session, Appendix, p. 2962). The Sub-Committee conducted hearings from April 8 to April 15, 1943, to investigate certain charges made *inter alia*, against plaintiff. The hearings before the Sub-Committee were held in executive session.

38 Plaintiff was invited to appear by letter dated April 7, 1943, as follows:

"DEAR DOCTOR WATSON: In accordance with H. Res. 105, 78th Congress, 1st Session, a copy of which is enclosed, the special subcommittee appointed thereunder has before it files from the Committee on Un-American Activities, the United States Civil Service Commission, the Federal Bureau of Investigation, and the Federal Communications Commission relative to your qualifications and suitability as a federal employee.

"The committee will examine these files beginning Friday, April 9, 1943, at 10 a. m. and you are instructed to appear at room 448 Old House Office Building at such time when opportunity will be afforded you to answer these charges and interrogations by the committee.

"A statement and list of the charges preferred against you before this committee by the Committee on Un-American Activities, House of Representatives, is immediately available for your inspection at the office of this committee.

"Very truly yours,

"(S) JOHN H. KERR.
Chairman, Special Subcommittee."

Plaintiff's reply, addressed to the Chairman of the Sub-Committee, and dated April 8, 1943, was as follows:

"GENTLEMEN: Thank you for your invitation to appear and make a statement before the Kerr Committee. I have the highest respect for this committee and welcome an opportunity for a thorough and judicial review of my case.

"I have prepared the accompanying statement of what seem to me the most relevant facts. With your permission, I should like to present this statement to the committee, and I shall then be glad to answer any questions.

"Yours respectfully,

"(S) GOODWIN WATSON.
Chief, Analysis Division."

The letter of April 7, 1943, advised plaintiff that if he was unacquainted with the charges and allegations concerning him, a copy would be furnished upon request. No such request was made by plaintiff. Plaintiff was shown at the hearing 29 charges made against him by the Committee on Un-American Activities of the House of Representatives, 78th Congress 1st Session, acting
39 pursuant to H. R. 282. The evidence and other materials gathered during the course of prior investigations by the Federal Bureau of Investigation, by the Committee on Un-American Activities, and by others which were considered by the Sub-Committee in connection with plaintiff's case were and are confidential, except that the charges formulated by the Committee on Un-American Activities were shown to plaintiff at the hearing. The general counsel of the Federal Communications Commission appeared at the first session of the Sub-Committee with the first person summoned before it and requested permission to appear as an observer for the Federal Communications Commission, but was advised by the Sub-Committee that it had decided to hold its hearings without any persons other than the Sub-Committee, its staff, and the witness being present. The general counsel thereupon withdrew. Plaintiff was not proffered nor did he request the opportunity to produce witnesses in his own behalf or to use the compulsory processes of the Sub-Committee to require other persons to appear before it to testify or to submit to cross-examination, nor were any witnesses called or heard by the Sub-Committee on behalf of plaintiff. No witnesses, other than plaintiff, testified before the Sub-Committee with respect to plaintiff. Plaintiff was questioned with respect to his membership and activity in various organizations and with respect to various writings, speeches, and activities on his part. Plaintiff was given at the hearing full opportunity to make any statements or explanations he desired with respect to the subject matter of the investigation. Plaintiff registered with the Sub-Committee no complaint as to its procedure or its treatment of him.

6. On April 21, 1943, the Special Sub-Committee of the Committee on Appropriations reported to the Committee on Appropriations. On April 26, 1943, the Federal Communications Commission, having considered the report of the Special Sub-Committee, concluded that it would retain plaintiff in its employment and issued a report thereon. On May 14, 1943, the Committee on Appropriations submitted a report (H. R. No. 448, 78th Cong., 1st Sess.) approving the findings of the said Special Sub-Committee and proposing an amendment to the Urgent Deficiency Appropriation Act, 1943 (H. R. 2714). Section 304 of the
40 Urgent Deficiency Appropriation Act of 1943 of July 12, 1943, as finally enacted (Public 132), provides as follows:

"SEC. 304. No part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act or (2) which is now, or which is hereafter made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States, shall be used, after November 15, 1943, to pay any part of the salary, or other compensation for the personal services, of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has been appointed by the President, by and with the advice and consent of the Senate: Provided, That this section shall not operate to deprive any such person of payment for leaves of absence or salary, or of any refund or reimbursement, which have accrued prior to November 15, 1943: Provided further, That this section shall not operate to deprive any such person of payment for services performed as a member of a jury or as a member of the armed forces of the United States nor any benefit, pension, or emolument resulting therefrom."

The President did not appoint plaintiff under Section 304.

7. On November 22, 1943, T. J. Slowie, Secretary of the Federal Communications Commission, in which capacity he acts as certifying officer for the Commission, wrote the following letter to the plaintiff:

"DEAR MR. WATSON: The Commission's records show that you have been on active duty with the Federal Communications Commission from November 7th through November 21st. Since the position which you hold pays a base salary of $6,500 per annum, your compensation for this pay period, with overtime, would ordinarily be $297.01. However, in your case there is a provision of law which makes it impossible to pay you the full sum to which you would otherwise be entitled.

"Section 304 of Public Law 132, 78th Congress, provides as follows:

* * * * * *

"Because of this provision, it is possible to compensate you only for your services from November 7th through November 15, 1943 and your compensation for this period with overtime is $178.21. Accordingly, after adjustment of tax deduction $23.60 and retirement deduction $8.13, there is enclosed a check for $146.48.

41 "If you desire to avail yourself of the benefits of the proviso which preserves your right to receive compensation for annual leave accrued prior to November 15, 1943, you should file an application for leave in the usual manner.

"Very truly yours,

"(S) T. J. Slowie,
T. J. SLOWIE, *Secretary.*"

Plaintiff demanded that he be paid for the services rendered to the United States as Chief of the Analysis Division, Foreign Broadcast Intelligence Service, from November 16, 1943, through November 21, 1943. This demand was refused. Plaintiff was given no instructions by the Commission to cease working on November 15, 1943. The Commission permitted plaintiff to remain at his desk as Chief of the Analysis Division, Foreign Broadcast Intelligence Service, from November 15, 1943, to November 21, 1943.

8. Plaintiff, because of Section 304 of the Urgent Deficiency Appropriation Act of 1943 and the fact that the President did not appoint him thereunder, has not received compensation from November 16, 1943, through November 21, 1943, nor has plaintiff ever received his pro rata annual base salary plus overtime, or any part thereof, for the services rendered during that period. The defendant, acting through the Federal Communications Commission, its agents, assistants or subordinates, and solely because of the operation of Section 304 of the Urgent Deficiency Appropriation Act of 1943 and the fact that the President did not appoint him thereunder, has refused and failed to pay plaintiff any compensation for the period from November 16, 1943, through November 21, 1943, nor has the defendant ever paid plaintiff his pro rata base salary plus overtime, or any part thereof, for services rendered during that period. The amount which has not been paid to plaintiff, and which has been withheld solely because of the operation of said Section 304 and the fact that the President did not appoint him thereunder, is $101.78.

No. 46628. William E. Dodd, Jr. v. The United States.

1. Plaintiff, William E. Dodd, Jr., is a citizen of the United States and at the time of the filing of this suit was a resident of Arlington, Virginia.

42 2. Plaintiff was appointed Editorial Assistant, Foreign Broadcast Intelligence Service, Federal Communications Commission, on December 1, 1941, by the Federal Communications Commission in the exercise of its authority to appoint such employees granted by Section 4 of the Federal Communications Act of 1934. Plaintiff took the oath of office on December 1, 1941. On December 22, 1942, plaintiff was appointed Assistant News Editor, Foreign Broadcast Intelligence Service, Federal Communications Commission, by the Commission pursuant to said authority.

3. Plaintiff has performed the duties incident to the respective positions of Editorial Assistant and Assistant News Editor, Foreign Broadcast Intelligence Service, Federal Communications Commission, from December 1, 1941, through November 21, 1943.

The compensation for the position of Assistant News Editor is fixed at a base rate of $3,200 per year, plus overtime computed in accordance with the War Overtime Pay Act of 1943. Since November 21, 1943, plaintiff has been on a leave-without-pay status at the Federal Communications Commission, and is in that status at the present time.

4. The Federal Communications Commission has general supervision and control over the independent agency which it heads. It has the power of appointment of various of the officers and employees necessary in the execution of its functions, as provided in the Communications Act of 1934, including the power of appointment of plaintiff. T. J. Slowie is the duly appointed, qualified and acting Secretary of the Commission and as such T. J. Slowie, or someone acting on his behalf, is authorized to approve before presentation for payment itemized vouchers for all expenditures of the Commission which may be necessary for the execution of its functions, including compensation to plaintiff, as provided by the Communications Act of 1934.

5. On February 9, 1943, the House of Representatives of the United States adopted House Resolution 105. Pursuant to this Resolution, a Special Sub-Committee of the Committee on Appropriations was appointed, and on March 23, 1943, the Sub-Committee adopted Rules of Procedure. These Rules were first published in the Congressional Record of June 2, 1943
43 — (Congressional Record, 78th Congress, 1st Session, Appendix, p. 2962). The Sub-Committee conducted hearings from April 9 to April 15, 1943, to investigate certain charges made, inter alia, against plaintiff. Plaintiff was invited by letter to appear in person before the Sub-Committee and make such statements or explanations under oath as he might desire, and to answer such questions as might be propounded. The plaintiff requested the Clerk of the Sub-Committee to exhibit to him any charges against him, and was advised by the Clerk that the Sub-Committee had formulated no charges. The evidence and other materials gathered during the course of prior investigations by the Federal Bureau of Investigation, by the Committee on Un-American Activities, and by others, which were considered by the Sub-Committee in connection with plaintiff's case, were and are confidential, except for the testimony of plaintiff before said Committee. The general counsel of the Federal Communications Commission appeared at the first session of the Sub-Committee with the first person summoned before it and requested permission to appear as an observer for the Federal Communications Commission, but was advised by the Sub-Committee that it had decided to hold its hearings without any persons other than the

Sub-Committee, its staff and the witness being present. The general counsel thereupon withdrew. Plaintiff was not proffered nor did he request the opportunity to produce witnesses in his own behalf or to use the compulsory processes of the Sub-Committee to require other persons to appear before it to testify or to submit to cross-examination, nor were any witnesses called or heard by the Sub-Committee on behalf of plaintiff. No witnesses, other than plaintiff, testified before the Sub-Committee with respect to plaintiff. Plaintiff was questioned with respect to his membership and activity in various organizations and with respect to various writings, speeches and activities on his part. Plaintiff was given at the hearing full opportunity to make any statements or explanations he desired with respect to the subject matter of the investigation. At the close of the hearing, plaintiff was also accorded an opportunity to make any statements he wished, but registered with the Sub-Committee no complaint as to its procedure or its treatment of him.

44 6. On April 21, 1943, the Special Sub Committee of the Committee on Appropriations reported to the Committee on Appropriations. On April 26, 1943, the Federal Communications Commission, having considered the report of the Special Sub-Committee, concluded that it would retain plaintiff in its employment and issued a report thereon. On May 14, 1943, the Committee on Appropriations submitted a report (H. Rep. No. 448, 78th Cong., 1st Sess.) approving the findings of the said Special Sub-Committee, and proposing an amendment to the Urgent Deficiency Appropriation Act, 1943 (H. R. 2714).

Section 304 of the Urgent Deficiency Appropriation Act of 1943, of July 12, 1943, as finally enacted (Public 132), provides as follows:

"SEC. 304. No part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act, or (2) which is now, or which is hereafter made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States, shall be used, after November 15, 1943, to pay any part of the salary, or other compensation for the personal services of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has been appointed by the President, by and with the advice and consent of the Senate: Provided, that this section shall not operate to deprive any such person of payment for leaves of absence or salary, or of any refund or reimbursement, which have accrued prior to November 15, 1943: Provided further, that this section shall not operate to deprive any such person of payment for services performed as a member of a jury or as a member of

the armed forces of the United States nor any benefit, pension, or emolument resulting therefrom."

The President did not appoint plaintiff under Section 304.

7. On November 22, 1943, T. J. Slowie, Secretary of the Federal Communications Commission, in which capacity he acts as the certifying officer of the Commission, wrote the following letter to the plaintiff:

"DEAR MR. DODD: The Commission's records show that you have been on active duty with the Federal Communications Commission from November 7th through November 21st. Since the position which you hold pays a base salary of $3,200 per annum, your compensation for this pay period, with overtime, would ordinarily be $159.51. However, in your case there is a provision of law which makes it impossible to pay you the full sum to which you would otherwise be entitled.

"Section 304 of Public Law 132, 78th Congress, provides as follows:

* * * * * *

"Because of this provision, it is possible to compensate you only for your services from November 7th through November 15, 1943, and your compensation for this period with overtime is $96.51. Accordingly, after adjustment of tax deduction $5.00 and retirement deduction $4.00, there is enclosed a check for $87.51.

"If you desire to avail yourself of the benefits of the proviso which preserves your right to receive compensation for annual leave accrued prior to November 15, 1943, you should file an application for leave in the usual manner.

"Very truly yours,

"(S) T. J. SLOWIE, *Secretary.*"

Plaintiff demanded that he be paid for the services rendered to the United States as Assistant News Editor, Foreign Broadcast Intelligence Service, from November 16, 1943, through November 21, 1943. This demand was refused. Plaintiff was given no instructions by the Commission to cease working on November 15, 1943. The Commission permitted plaintiff to remain at his desk as Assistant News Editor, Foreign Broadcast Intelligence Service, from November 15, 1943, to November 21, 1943.

8. Plaintiff, because of Section 304 of the Urgent Deficiency Appropriation Act of 1943 and the fact that the President did not appoint him hereunder, has not received compensation from November 16, 1943, through November 21, 1943, nor has plaintiff ever received his pro rata annual base salary plus overtime, or any part thereof, for the services rendered during that period. The defendant, acting through the Federal Communications Com-

mission, its agents, assistants or subordinates, and solely because of the operation of Section 304 of the Urgent Deficiency Appropriation Act of 1943 and the fact that the President did not appoint him thereunder, has refused and failed to pay plaintiff any compensation for the period from November 16, 1943,
46 through November 21, 1943, nor has the defendant ever paid plaintiff his pro rata base salary plus overtime, or any part thereof, for services rendered during that period. The amount which has not been paid to plaintiff, and which has been withheld solely because of the operation of said Section 304 and the fact that the President did not appoint him thereunder, is $59.83.

Conclusions of law

Upon the foregoing special findings of fact, which are made a part of the judgments herein, the court concludes, as a matter of law, that the plaintiffs are entitled to recover.

It is therefore ordered and adjudged that plaintiff Robert Morss Lovett (in case No. 46026) recover of and from the United States the sum of one thousand nine hundred ninety-six dollars and forty cents ($1,996.40); that plaintiff Goodwin B. Watson (in case No. 46027) recover of and from the United States the sum of one hundred one dollars and seventy-eight cents ($101.78); and that plaintiff William E. Dodd, Jr. (in case No. 46028) recover of and from the United States the sum of fifty-nine dollars and eighty-three cents ($59.83).

Opinion

WHALEY, Chief Justice, delivered the opinion of the court:

On August 26, 1943, plaintiff Robert Morss Lovett was appointed Executive Assistant to the Governor of the Virgin Islands by the Secretary of the Interior, pursuant to authority granted in Section 23 of the Organic Act of the Virgin Islands of the United States, approved June 22, 1936, 49 Stat. 1807, 1813. He took the oath of office and entered upon the duties thereof October 12, 1943. He performed them thereafter through March 13, 1944, at which time his services ended. He has not been paid the salary of his office for the period November 15, 1943, through March 13, 1944, which amounts to $1,996.40, and this sum he sues to recover.

Plaintiff Goodwin B. Watson was appointed Chief of the Analysis Division, Foreign Broadcast Intelligence Service, Federal Communications Commission, November 16, 1941, by the Federal Communications Commission, and took the oath
47 of office and entered upon the duties thereof on that date.

and performed them thereafter through November 21, 1943, when his active services ended. His appointment was made under Section 4 of the Communications Act of 1934, approved June 19, 1934, 48 Stat. 1064, 1066. He sues to recover the salary of his office from November 16, 1943, through November 21, 1943, amounting to $101.78, which he has not been paid.

Plaintiff William E. Dodd, Jr., was appointed Assistant News Editor, Foreign Broadcast Intelligence Service, Federal Communications Commission, December 22, 1942, by the Federal Communications Commission, under Section 4 of the Communications Act of 1934, immediately entering upon the duties of that office. He performed those duties thereafter through November 21, 1943. He has not been paid the salary attached to that office for the period from November 16, 1943, through November 21, 1943, which amounts to $59.83, and he sues herein for that amount.

None of the appointments here involved were made by the President of the United States and confirmed by the Senate.

The three cases have been submitted on stipulations, and they have been briefed and argued together. The general question raised has been the constitutionality of Section 304 of the Urgent Deficiency Appropriation Act, 1943, 57 Stat. 431, 450.

The plaintiffs assert that the section is unconstitutional, setting forth their reasons for that assertion. The Attorney General having heretofore also taken the position that the section was unconstitutional, and still adhering to that position, the Assistant Attorney General, appearing for the defendant, supports the plaintiffs. Special counsel appear in the cases as *amici curiæ*, having been employed to defend the constitutionality of the disputed section. The special counsel are designated variously in the record as representing the House, the Congress, the United States. Their brief is entitled "Brief for the Congress of the United States," and they sign as "Special Counsel for the Congress of the United States." They will hereinafter be referred to as "special counsel."

Insofar as the law involved in these three cases is concerned, they are not to be distinguished one from the other.

48 Special counsel raise the question of jurisdiction. Section 145 of the Judicial Code governs. The general jurisdiction of this Court in pay cases is too well-known and established to justify re-examination. Section 304, which will be quoted verbatim, in no way indicates that this Court is without jurisdiction. There is not a line or word to that effect. Inferences will not be employed to go to the extent of holding that Congress went so far as to deny these plaintiffs their day in court. The jurisdictional statute is general, and Section 304 contains no exception.

Section 304 is as follows:

"SEC. 304. No part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act, or (2) which is now, or which is hereafter made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States, shall be used, after November 15, 1943, to pay any part of the salary, or other compensation for the personal services of Goodwin B. Watson; William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has been appointed by the President, by and with the advice and consent of the Senate: Provided, That this section shall not operate to deprive any such person of payment for leaves of absence or salary, or of any refund or reimbursement, which have accrued prior to November 15, 1943: Provided further, That this section shall not operate to deprive any such person of payment for services performed as a member of a jury or as a member of the armed forces of the United States nor any benefit, pension, or emolument resulting therefrom."

If Section 304 is unconstitutional and of no effect, recovery follows. Special counsel argue that it is not severable. Their argument is not convincing. We are in no doubt about our jurisdiction.

If, on the other hand, Section 304 is a valid exercise of constitutional power, but notwithstanding that plaintiffs are entitled to recover, then it becomes a matter of indifference whether the section is valid or invalid as an exercise of constitutional power.

The Court will not reach out gratuitously to avail itself of questionable but inapplicable elements in an act and thereby hold it to be unconstitutional. There is always the presumption of validity. The Court will not undertake to say that, because provisions in Section 304, not here operative, are invalid, the whole of the section falls for invalidity.

Much of the argument presented seems to be based on a supposed lack of appropriation. But there was an appropriation. Section 304 refers to an actual appropriation, an "available" appropriation. If "available," the appropriation, as far as these cases are concerned, was available for the payment of these salaries. Availability of the appropriation for other purposes is beside the question. The disbursing agency could divert no part of an appropriation to purposes other than those for which that appropriation was made. Section 304 does not say "otherwise" available, and important words may not be put into the statute that Congress did not place there. There was an appropriation, it was available for the payment of these salaries. If it was not available for the payment of these salaries, then it was clearly not "available" to the administrative bureau. Congress did not

limit the appropriation. What it did limit and what it was directed to was the activities of the disbursing agency. There and there only, did Congress apply the brakes.

Section 304 is notable for what it did not do, as well as for what it did do.

It did not terminate plaintiffs' services. Special counsel insist that it did not work removal from office, and so stated on argument of the cases.

Removal from office is not made an item of damages here. The claim made is only for salary of the office during the time of service, and no longer. We are therefore not concerned with the cause of termination, or in what situation, except for lack of pay, the plaintiffs found themselves thereafter.

This limitation upon the claims made explains why it has not been necessary in reviewing the facts, to gather in many things that are of record, or of which judicial notice may be taken. Many of the circumstances are interesting only, and in no sense material to disposition of the cases.

There is nothing in Section 304 which disturbed plaintiffs' incumbency in office. Special counsel in their brief say

50 "All that the statute did was to say to the disbursing officers of the Government: After November 15, 1943, you shall not pay out any money to Watson, Dodd and Lovett unless prior to that date they have been appointed by the President and confirmed by the Senate. This was merely a direction to disbursing officers, and in itself created no legal rights in anyone."

We repeat, the Court, in passing upon the constitutional validity of a statute will not gratuitously reach out to make use of that which is irrelevant to the case in hand. It was said in Watson v. Buck, 313 U. S. 387, 402:

"A law which is constitutional as applied in one manner may still contravene the Constitution as applied in another. Since all contingencies of attempted enforcement cannot be envisioned in advance of those applications, courts have in the main found it wiser to delay passing upon the constitutionality of all the separate phases of a comprehensive statute until faced with cases involving particular provisions as specifically applied to persons who claim to be injured."

Section 304 does comprehend more than a direction not to pay for the isolated services here rendered. But that "more" is here irrelevant. In terms the section extends to all available appropriations, all disbursing officers, all departments, agencies or instrumentalities of the United States, all personal services of the instant plaintiffs, and is without limitation in time. But in the cases before us we have for consideration only one specified person

of employment; and, the conditions of that specific employment. We cannot introduce situations which are not before us, and which may indeed never come into being. It may be repeated that here we have no claim for damages for removal from office, no petition for compulsory process, solely a claim for the accrued unpaid salary of an office, the duties of which have been performed by the undisputed holder of that office. These are not suits for reinstatement to office. As was said in California v. Southern Pacific Railroad, 149 U. S. 308, 314:

"The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. Which, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard."

The incumbent of the office held it de jure. There was no irregularity in the appointment. There was no removal of the officer from the office, no removal of the salary from the office. The appropriation was made and designated as "available." The only appropriation here, in praesenti, is the appropriation available to pay these salaries.

The closer the statute is examined, the more clearly does it appear that with reference to the particular situation we have here, Congress confined itself to one thing—prohibiting the disbursing agencies from paying the salaries of the plaintiffs. The Act is very carefully framed to avoid denying pecuniary obligations. It is a bare caveat issued against the disbursing agency. As special counsel contend, Congress did not remove from office. The original appointment was unaffected, the office was undisturbed, the compensation was unchanged, the incumbents were not separated from office. They held de jure.

Quoting again from the brief of special counsel:

"Section 304 did not deprive plaintiffs of any right to salary. Section 304 denied to the Federal Communications Commission and to the Secretary of the Interior the funds with which to pay plaintiffs; and since under 47 U. S. C., Sec. 154 grand 48 U. S. C., Sec. 1405 v, the power of those agencies to grant plaintiffs a right to salary depended upon the existence of such funds, Section 304 prevented these agencies from granting the right plaintiffs assert."

We are not free to conclude that Section 304 accomplished deviously that which for certainty's sake should have been accomplished directly, if it could be accomplished at all. What it did do directly, not indirectly, constitutionally or unconstitutionally, and nothing more, was to stay the hand of the disbursing agency.

There would have been no occasion for Section 304 to stop payment if the plaintiffs were not holding their respective offices in fact and in law. No disbursing agent had authority to make payment of salaries to men out of office or not entitled to office, and a direction to such an agent not to pay the salary to a legally displaced officeholder would have been something less than an empty gesture. The obvious circumstance that the section was dealing with was one where the plaintiffs were legally and actually in office. Section 304 did not remove them.

It is to no very useful purpose to inquire into the reason for enactment of Section 304. But, it may be remarked in passing, that it is impossible to conclude that Congress meant that in the final outcome, service was to be free to the Government, because the plaintiffs were, in its opinion let us say, unfit for office. It is plain that the plaintiffs, if unfit, were just as unfit serving the Government for nothing, as serving it for something. There is no logic to the proposition that the plaintiffs were to serve the Government for nothing. The proposition is irrational. Unfitness could not be converted into fitness by withholding salary. Yet the statute allowed these plaintiffs to continue in office.

Section 304 is not to be construed beyond its express, explicit terms, nor beyond its incidence in time. It effectually halted the disbursing process in a special situation, at a particular time. We are not here concerned with other situations, other times. The situation, the occasion, has now passed into history. The accomplished event is not now before the Congress and never has been. But it is here and now before this Court.

It is urged that plaintiffs must fail, because the procedure was not followed of having an appointment "by the President, by and with the advice and consent of the Senate," as provided for in Section 304. It has been observed that Section 304 is notable for what it does not say. It does not say that the services of the plaintiffs are terminated, that they shall not continue on under their current appointments. In other words, as special counsel observe, the section did not remove them from office. The
53 plaintiffs did not have to have a presidential appointment in order to continue in office. They did continue in office. It is only the period of their continuance in office, after November 15, 1943, that is involved in this controversy.

In a long line of cases it has been held that lapse of appropriation, failure of appropriation, exhaustion of appropriation, do not of themselves preclude recovery for compensation otherwise due. King v. United States, 1 C. Cls. 38; Graham v. United States, 1 C. Cls. 380; Curtis v. United States, 2 C. Cls. 141; Grant v. United States, 5 C. Cls. 71; Collins v. United States, 15 C. Cls. 22; Briggs v. United States, 15 C. Cls. 48; Parsons v. United States, 15 C. Cls. 246; Hufham v. United States, 17 C. Cls. 55; Dougherty v. United States, 18 C. Cls. 496; Ferris v. United States, 27 C. Cls. 542; Sherlock v. United States, 43 C. Cls. 161; Strong v. United States, 60 C. Cls. 627; Danford v. United States, 62 C. Cls. 285; McNeil v. United States, 64 C. Cls. 406; Cogswell v. United States, 68 C. Cls. 691; Palmer v. United States, 69 C. Cls. 260; Crist v. United States, 74 C. Cls. 283; Conrad v. United States, 74 C. Cls. 289; Wilson v. United States, 77 C. Cls. 630; Leonard v. United States, 80 C. Cls. 147; Miller v. United States, 86 C. Cls. 609; United States v. Langston, 118 U. S. 389; United States v. Vulte, 233 U. S. 509.

The provision in Section 304 that no available appropriation shall be used to pay the salaries of these plaintiffs, here in question, does not reach to this Court. Speaking with reference to the constitutional provision that no money shall be drawn from the Treasury but in consequence of appropriations made by law, this Court said (Collins v. United States, supra):

"That provision of the Constitution is exclusively a direction to the officers of the Treasury, who are intrusted with the safe-keeping and payment out of the public money, and not to the courts of law; the courts and their officers can make no payment from the Treasury under any circumstances.

"This court, established for the sole purpose of investigating claims against the government, does not deal with questions of appropriations, but with the legal liabilities incurred by the United States under contracts, express or implied, the laws of Congress, or the regulations of the executive departments."

54 Section 304 made no pretense to determine a legal liability. It assumed no judicial function. It simply prevented a particular disbursement from a particular fund, no more than that if it be taken for just what it says, without inferences. We are confining ourselves, of course, to the precise claims asserted.

In United States v. Dickerson, 310 U. S. 554, it was held that an appropriation act could suspend the operation of a prior statute granting certain reenlistment allowances. Granted that an appropriation act may be something more than an accounting process, in the case we have here Section 304 makes no attempt to

change or do away with compensation attached to the offices held by the plaintiffs. It merely stopped payment in three specific instances (no other instances are here involved), regardless of obligation.

The obligation was undisturbed. The Act did not say it was destroyed, or even subtly attempt to destroy it, unless we are to indulge in inferences, which we are not disposed to do. It did not say to the plaintiffs: "You are discharged." The status of the plaintiffs was untouched.

The cases cited indicate survival of the obligation in spite of lapse, exhaustion, failure of appropriation. Other reported cases, not pay cases, are crowded with instances of unliquidated damages recovered, recovery against the United States being had in the absence of any appropriation, at all to pay unliquidated damages and in the absence of any authority in the disbursing agency to satisfy the litigant's claim.

In the three cases now here considered there was more than in the cases cited. There were in existence "available" appropriations. As heretofore indicated, full value must be given to the express word "available." It can not be changed to "unavailable." If the appropriations could not be used for these offices, then they were unavailable. The statute says they are available, and they must be so considered.

We have pointed out that Section 304 was without time limitation. Congress can not bind itself to discontinue legislation, if it is to go on as a constitutional body. It may therefore repeal Section 304. Section 304 is statutory, not a part of the Constitution. It may or may not turn out to be permanent legislation.

Congress, by enacting Section 304, did not foreclose itself from thereafter appropriating for the payment of these salaries. Congress even now may appropriate, and so authorize a selected disbursing agency to pay them. Claims therefor, presented to Congress, may be satisfied by an appropriation to pay them, as claims. Judgments, recovered here, may be satisfied by any appropriation out of which the judgments may be by Act of Congress, payable.

The statute did not separate the plaintiffs from office, it did not take away the salary of that office, it did not prohibit plaintiffs from receiving their salaries. The Act did provide an appropriation for the payment of their salaries. The appropriation for the pay period was there, but it was not made use of. The plaintiffs were appointed lawfully, they continued in office lawfully. Section 304 is no way disqualified them, and we can find no rational basis for construing the Act otherwise than as a mere stoppage of disbursing routine, nothing more. To construe

it as something more is to volunteer inferences. Whether the Congress had the constitutional authority to stop payment, within the limitations of the Act, is immaterial. That which is material is that the salaries have not been paid, that the obligation was never destroyed, and that the obligation continues to this day.

In the conclusion arrived at, it is immaterial whether Section 304 of the Urgent Deficiency Appropriation Act, 1943, or any part thereof, is constitutional or not. We do not decide that question. The plaintiffs are entitled to recover in either event. As previously indicated, consideration of Section 304 is necessarily confined to narrow limits, as narrow as the claims themselves.

Plaintiff Robert Morss Lovett in case No. 46026 is entitled to recover $1,996.40; plaintiff Goodwin B. Watson in case No. 46027 is entitled to recover $101.78; and plaintiff William E. Dodd, Jr., in case No. 46028, is entitled to recover $59.83. Judgments will be entered accordingly. It is so ordered.

LITTLETON, Judge, concurs.

WHITAKER, Judge, concurring:

I desire to state very briefly the reason for my concurrence in the result reached by the court.

In the brief filed for the Congress it is argued that the power of that body to appropriate money is without limitation and, hence, that it can attach any condition it pleases on the use of the money appropriated. Even if we accept this statement without limitation, still, section 304 goes much beyond a mere restriction on the use of the money appropriated by that Act. It not only prohibits the use of the money thereby appropriated to pay plaintiffs' salaries, but it also prohibits the use of any money theretofore or thereafter to be appropriated to pay their salaries, either in their present positions or in any other governmental positions, except as jurors or members of the armed forces. This amounts to depriving plaintiffs of their rights as citizens to enjoy the emoluments of office. It is, therefore, an Act inflicting punishment upon them without a judicial trial.

The passage of such an Act is prohibited by clause 3 of section 9 of Article I of the Constitution, which reads: "No bill of attainder or ex post facto law shall be passed." A bill of attainder has been defined by the Supreme Court as "a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties." Cummings v. Missouri, 4 Wallace 277, 323.

I have no doubt that section 304 of this appropriation Act violates this provision of the Constitution; no judicial tribunal has found them guilty of any crime, but by this Act they have been denied the salary attached to any office they may now or hereafter occupy. Patently, this violates this provision of the Constitution. If it does, it is void, although if was enacted in the exercise of the power of Congress to appropriate money. The grant of any power by the Constitution is subject to the limitation that it must not be exercised in a way that would nullify another provision of the Constitution. See, for instance, Marbury v. Madison, 1 Cranch, 137; Rhode Island v. Massachusetts, 12 Pet. 657; Knowlton v. Moore, 178 U. S. 41; Dick v. United States, 208 U. S. 340.

Since I am convinced that this Act does violate this provision of the Constitution, I find it unnecessary to consider the other constitutional objections to it, to wit, whether it amounted to a removal of these men from office or a denial of due process of law.

57 Courts never take pleasure in saying that a coordinate branch of the Government has exceeded its constitutional powers; certainly in this case I take no pleasure in saying that Congress has done that which it had no power to do; but since I am convinced that the restriction amounts to a bill of attainder I am under compulsion to say that the restriction is invalid and, hence, cannot operate to deprive these men of the salaries to which their positions entitle them.

JONES, Judge, concurring.

I concur in the result.

The single issue in this case is whether Section 304, as worded, is a valid exercise of the constitutional powers of the Congress.

The authority of the Congress to make appropriations, within the framework of the Constitution, is plenary. The power to make appropriations carries with it the power to withhold or deny appropriations. That power has been exercised for generations. This is as fundamental as the ten commandments.

As to the wisdom of granting or withholding appropriations, the courts have no right to pass judgment, granted, of course, that the Congress is acting within the scope of its authority.

The Congress has the sheer power to grant or withhold current appropriations to individuals except for services already rendered, regardless of whether the action taken is wise or unwise. It does not have to assign a reason for such action, and we have no right to ask for a reason.

A member's constituency alone, under our philosophy of government, has a right to call such member to account.

Having the power to appropriate for specified purposes it has the power to limit the use of such funds so long as it is merely a limitation.

If Section 304 merely forbade the use of funds in the bill, or other funds already available in other bills, I would have no hesitancy in holding it a limitation on appropriation.

The true issue is narrowed to whether the expression "or which is hereafter made available under or pursuant to any other act" transforms it from an appropriation to a legislative provision, and whether such legislation deprives plaintiffs of valuable rights as citizens which they would otherwise have under the Constitution.

The language quoted goes beyond a mere limitation on appropriation and becomes, unless affirmatively repealed, a permanent denial of plaintiffs' rights as citizens. A rose remains a rose even though someone calls it a lily.

No one has a right to be employed by the Government, but every citizen, whose rights have not been legally forfeited, is privileged to apply for any position within the Government and to have his application considered on its merits. This is a thing of value not only intrinsically, but because of the satisfaction it brings a man regardless of whether it is ever exercised. The knowledge of its possession is a powerful element in the pursuit of happiness. Section 304 forecloses this right and closes that door of opportunity.

The national government is one of delegated powers in all its branches. All powers not delegated remain with the states or with the people.

The tenth amendment is as follows:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The ninth amendment is as follows:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The power to provide or deny appropriations is vested in the Congress. There is no other way to take money out of the Treasury. The Constitution provides (Art. I, Sec. 9):

"No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law * * *."

If Section 304 were a mere denial of appropriation, however unjust it might be, it could not be successfully questioned. But it does not stop with a mere denial of appropriation. It goes far beyond this. It forbids on a permanent basis employment in the future. It this becomes a permanent legislative bar,

I cannot find within the four corners of the Constitution any power lodged in the Congress to deny these privileges to
59 any citizen, except in the manner prescribed in the Constitution.

The principle of equality was written in the Declaration of Independence before we had a Constitution. It was the result of a long struggle of English peoples upward toward the plains of liberty. It is one of our proudest traditions. It was carried forward into the Constitution. It shines through almost every provision in that instrument. The Constitution provides for liberty, equality and fair play; and freedom from every form of new and old world caste and privilege, and from the tyranny of wealth and birth. It throws every safeguard around the rights and privileges of the individual citizen.

The right to seek employment is one of the most highly prized rights of the Anglo-Saxon race. When a citizen by his conduct forfeits any of his rights, privileges, and immunities, a method is provided for establishing that forfeiture. That method was not pursued here. One of the chief glories of the Constitution is the fact that you cannot take the shirt from the back of a ragged street urchin without either securing the lad's consent or paying for the rags in the manner prescribed by law. The same is true of his privileges in every form. Truax v. Raich, 239 U. S. 33, 41; Yick Wo v. Hopkins, 118 U. S. 356, 370; International News Service v. Associated Press, 248 U. S. 215, 236.

Section 304 in making a permanent ban on the rights and privileges of the plaintiffs, exceeds the authority delegated to the Congress by the Constitution.

MASON, *Judge*, concurring in the result.

I agree with the decision of the court, but, because of the importance and variety of the problems presented, I make the following additional observations.

Nothing is claimed to have been done or said or written by any of the plaintiffs which was unlawful. No statute or legal doctrine is brought forward under which it is claimed that they could have been restrained before utterance or action, or punished thereafter by so much as a penny fine. And no indirect adverse legal consequences were attached to what they said or did by any legal doc-
60 trine, or by statutes such as the Hatch Act, or the various provisions in other acts disqualifying for Government employment members of organizations which advocate the overthrow of our constitutional form of government. It is not claimed that they violated those laws. In short, what they did was completely innocent and of no interest or consequence to the law

of the land as it then was, or, as to all persons except the three plaintiffs, as the law still is. And this was true without any resort to constitutional protections of freedom of utterance or action. The law, wholly apart from the Constitution, did not touch what they had done. But as a consequence of their having done what they did, the three plaintiffs find themselves excommunicated, reduced to the status of three second-class citizens among all of the millions of their fellows. They find themselves subject to the same obligations as their fellow first class citizens to obey the laws, pay taxes, and serve in the armed forces and on juries; but completely and perpetually disqualified from serving their Government in any of the thousands of positions in which any of the rest of us, if technically capable, may serve. It is not claimed that the three plaintiffs were not competent to perform, or did not faithfully perform, the duties of the positions they held.

Has Congress the power to remove, by statute, named individuals from Government service, and make them perpetually ineligible to hold positions in Government service because they have engaged in conduct which was entirely lawful? Section 304 purports to do this. If it in fact accomplishes it, it has accomplished, under the guise of law, a shocking and outrageous injustice, unique in our history, and discouraging because it follows one hundred and fifty years of experience under the best Government men have devised. The court's problem is not, of course, whether Section 304 is unjust, but whether it is unconstitutional. But when the injustice of the particular law is so shocking, and the threat of its repetition and extension is so menacing to our institutions, as in the case of Section 304, one can hardly be blamed for saying to himself, even before he consults the text of the Constitution, "If the Constitution is the charter of liberty and free government which I have always supposed that it is, does not permit this."

61 If Section 304 is valid, Congress can disqualify for public office or service racial minorities, political minorities, and, probably, religious minorities. To do so would, indeed, be less unjust than what is done by Section 304. If a racial minority were excommunicated, the statute would at least have one quality of what we have been accustomed to regard as law, the quality of generality of application to all persons of an ascertainable class. No individual would have the finger of the state pointed at him, as these three plaintiffs have, saying "You are degraded, not because of the kind of person you are, for there may be thousands of persons just like you in all essential respects, who are still full citizens; not because of what you have done, for there may be thousands of persons who have done the same things, so far as those things are relevant to a rational state, as you have done.

You are degraded because the state has selected you for degradation." And a racial or other minority could under the constitutional protections which would apply even to second-class citizens, pool their resources and agitate for the repeal of the statute with some slight hope that in the turn of political events a powerful party might need the votes of this minority to insure its success, and hence would espouse its cause. But three individuals, such as these plaintiffs, are helpless. If they speak, who will listen? If they should happen to have the money to publish, who will read? Their appeal would appear to be completely selfish. The reaction would be: "Who are these persons, of the dominant race, of many generations of honorable American ancestry, to be complaining of discrimination? I don't know just what has happened to them, but if they can't take care of themselves, nobody can." And nobody can, if Section 304 is valid.

Section 304 is asserted by the plaintiffs to be unconstitutional because (1) it purports to remove the plaintiffs from executive offices, and no power of removal resides in the legislative branch of the Government, except by impeachment; (2) it is a bill of attainder, or its equivalent, a bill of pains and penalties, which the Constitution forbids; and (3) it deprives the plaintiffs
62 of liberty and property without due process of law, in violation of the Fifth Amendment.

I have no doubt that Section 304 is a bill of pains and penalties and is therefore unconstitutional. It has the ancient flavor of the bills of attainder which were so odious to the makers of our Constitution that they forbade such laws in the main body of the Constitution and before the bill of rights later embodied in the first ten amendments was thought necessary, in that it, like the bills of attainder that the fathers were familiar with, selects its victims as named individuals, and not as persons belonging to any describable class. It punishes them by removal from office and income and disqualification from ever again serving their Government for compensation except in military or jury service. It thus imposes the same penalty which the Senate is authorized to impose, on conviction by a two-thirds vote after impeachment by the House, upon officers guilty of "treason, bribery, or other high crimes and misdemeanors." The question of whether the forfeiture of the right to pursue a public calling was punishment, so that a statute imposing it for past innocent conduct is an ex post facto law and a bill of pains and penalties was settled right in the cases of Cummings, the priest, 4 Wall. 277, and Garland, the lawyer, 4 Wall. 333.

I think Section 304 violates the Fifth Amendment in that it attempts to deprive the plaintiffs of liberty and property without

due process of law. I recognize that the Fifth Amendment does not, like the Fourteenth, which applies only to state governmental action, expressly assure equal protection of federal laws. But a statute which selects persons for punitive action on a completely personal basis, with no attempt to treat similarly other persons similarly situated, is so foreign to our concepts of law that it is difficult to think of it as law at all, though it bears the stamp of legislative enactment. If a legislature refuses to define the conduct which it desires to punish, if done by A, in such terms that B and C and D and will be equally punishable if they do it, but instead merely provides that A shall be punished if he does it, the legislature engages, not in law making, but in arbitrary action.

And this would be true, even if the statute did not, as Sec-
63 tion 304 does, attempt to make punishable conduct which was wholly innocent when engaged in. There are indications in opinions of the courts, though the necessity for deciding the questions has not hitherto arisen, that the due process of law which is required by the Fifth Amendment would not be satisfied by the arbitrary selection by the legislature of certain named individuals to be the sole victims of penal laws. In Hurtado v. California, 110 U. S. 516, 535, where the arbitrary action of a state was in question, the court said:

"But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, * * *".

The cases of Nichols v. Coolidge, 274 U. S. 531; Wallace v. Currin, C. C. A. 4, 95 F. (2d) 856; Minski v. United States, C. C. A. 6, 131 F. (2d) 614; United States v. Ballard, W. D. Ky., 12 F. Supp. 321, also indicate the same attitude toward governmental action in the guise of law which penalizes persons unequally. I think, therefore, that Section 304 is forbidden by the Fifth Amendment.

It is urged that Section 304, even if it would otherwise be invalid as a trespass by Congress upon the executive function of removal of executive officers, is saved by the provision that these plaintiffs might keep their positions if, within the period of a few months set by the statute, they were appointed by the President and confirmed by the Senate. But no other person in the country had to pursue such a course in order to obtain or hold those positions, or identical or comparable ones. The requirement was intended to be, and was, discriminatory and oppressive

as to three selected individuals out of all the people in the country. Under a system of equal justice under law, the three plaintiffs should not be subjected, in order to get or hold a Government position, to any other or different requirements than the rest of us are subject to. And the Constitution, I think, forbids their being so oppressed.

It is, in effect, urged that even though Section 304 is unconstitutional for any or all of the reasons suggested, there can be no relief for its victims because the Section is a part of an Appropriation Act, and the power of Congress to control *expenditures* is absolute. It may well be that under our Constitution, and under any constitution which might be devised for a free people, one branch of the Government could, temporarily at least, subvert the Government. The Judges might refuse to enforce legal rights or convict criminals. The President might order the Army and Navy to surrender to the enemy. Congress might refuse to raise or appropriate money to pay the President or the Justices of the Supreme Court and the other courts. But any of these imagined actions would not be taken pursuant to the Constitution, but would be acts of subversion and revolution, the exercise of mere physical power, not lawful authority. And conduct by any branch of the Government less ruinously subversive, but, so far as it goes, equally unconstitutional, is likewise an exercise of physical power rather than lawful authority. I do not think, therefore, that the power of the purse may be constitutionally exercised to produce an unconstitutional result such as a taking of a citizen's liberty or property without due process of law, a conviction and punishment of a citizen for wholly innocent conduct, or a trespass upon the constitutional functions of another branch of the Government. And to whatever extent it is within the jurisdiction of a court to which the question is presented in litigation, to give judgment according to the Constitution, even though that requires the court to disregard a statute which conflicts with the Constitution, the judges are bound by their oaths to give such a judgment. In this case, therefore, we must disregard Section 304. Without it, the plaintiffs are in the position of having performed services for the Government, under lawful appointments, for which the Government has refused to pay. Each of them is, therefore, entitled to a judgment.

64

65 *Judgment of the court*

November 5, 1945

Upon the special findings of fact, which are made a part of the judgments herein, the court concludes, as a matter of law, that the plaintiffs are entitled to recover.

It is therefore ordered and adjudged that plaintiff Robert Morss Lovett (in case No. 46026) recover of and from the United States the sum of one thousand nine hundred ninety-six dollars and forty cents ($1,996.40); that plaintiff Goodwin B. Watson (in case No. 46027) recover of and from the United States the sum of one hundred one dollars and seventy-eight cents ($101.78); and that plaintiff William E. Dodd, Jr. (in case No. 46028) recover of and from the United States the sum of fifty-nine dollars and eighty-three cents ($59.83).

[Clerk's certificate to foregoing transcript omitted in printing.]

Supreme Court of the United States

No. 809, October Term, 1945

Order allowing certiorari

Filed March 25, 1946

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

Supreme Court of the United States

No. 810, October Term, 1945

Order allowing certiorari

Filed March 25, 1946

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

Supreme Court of the United States

No. 811, October Term, 1945

Order allowing certiorari

Filed March 25, 1946

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	3
Reasons for granting the writ	8
Conclusion	15

CITATIONS

Cases:	
Belknap v. *United States*, 150 U. S. 588	11
Dunwoody v. *United States*, 143 U. S. 578	9
Markham, et al. v. *Cabell*, No. 76, October Term, 1945, decided December 10, 1945	9
United States v. *Dickerson*, 310 U. S. 554	9, 11
United States v. *Langston*, 118 U. S. 389	9, 11
United States v. *Mitchell*, 109 U. S. 146	9
United States v. *Vulte*, 233 U. S. 509	9
Statute:	
Urgent Deficiency Appropriation Act, 1943, 57 Stat. 431	2, 4
§ 304	2, 5, 10
Miscellaneous:	
89 Cong. Rec. 734, 742	3, 11, 13
89 Cong. Rec. 7521	5, 14
89 Cong. Rec. 10882	6
H. Rep. 448, 78th Cong., 1st Sess	4, 11, 12, 14
H. Rep. 1117, 78th Cong., 2d Sess	6
H. Res. 405, 78th Cong., 1st Sess	4, 11, 13
H. Res. 386, 78th Cong., 1st Sess	6
House Rule XXI, Clause 2	13, 14
S. Rep. 724, 78th Cong., 2d Sess	6

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 809

UNITED STATES, PETITIONER

v.

ROBERT MORSS LOVETT

No. 810

UNITED STATES, PETITIONER

v.

GOODWIN B. WATSON

No. 811

UNITED STATES, PETITIONER

v.

WILLIAM E. DODD, JR.

PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that writs of certiorari issue to review the judgments of the Court of Claims of the United States entered in the above-entitled cases on November 5, 1945.

OPINIONS BELOW

The opinions in the Court of Claims (R. 33–48) have not yet been officially reported.

JURISDICTION

The judgments of the Court of Claims were entered on November 5, 1945 (R. 33, 41, 48–49). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED

1. Whether Section 304 of the Urgent Deficiency Appropriation Act, 1943, 57 Stat. 431, 450, *infra*, undertook to terminate the respondents' services, and not merely to prohibit disbursing agencies from paying their salaries.

2. If so, whether Section 304 is constitutional.

3. Whether, in view of Section 304 and the failure of the President to appoint respondents thereunder, the United States incurred a legal obligation to pay respondents for services rendered after November 15, 1943.

4. Was the Court of Claims presented with justiciable controversies.[1]

STATUTE INVOLVED

Section 304 of the Urgent Deficiency Appropriation Act, 1943, 57 Stat. 431, 450, provides as follows:

> SEC. 304. No part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act, or (2) which is now, or which is hereafter

[1] This question is presented at the request of counsel appointed by the subcommittee of the House Committee on Appropriations pursuant to H. Res. 386, 78th Cong., 1st Sess.

made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States, shall be used, after November 15, 1943, to pay any part of the salary, or other compensation for the personal services, of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has been appointed by the President, by and with the advice and consent of the Senate: *Provided,* That this section shall not operate to deprive any such person of payment for leaves of absence or salary, or of any refund or reimbursement, which have accrued prior to November 15, 1943: *Provided further,* That this section shall not operate to deprive any such person of payment for services performed as a member of a jury or as a member of the armed forces of the United States nor any benefit, pension, or emolument resulting therefrom.

STATEMENT

In 1939 respondent Lovett was duly appointed the United States Government Secretary of the Virgin Islands. On August 26, 1943, he was duly appointed Executive Assistant to the Governor of the Virgin Islands and entered on duty as such on October 12, 1943 (Lovett Fdgs. 2, 4; R. 19–20, 33).[3]

[3] The court below considered and disposed of these three cases together, but made separate findings of fact with respect to each of the three respondents and numbered the findings relating to each respondent in a separate series.

On November 16, 1941, respondent Watson was duly appointed Chief of the Analysis Division, Foreign Broadcast Intelligence Service, Federal Communications Commission (Watson Fdg. 2; R. 24, 33). On December 1, 1941, respondent Dodd was duly appointed Editorial Assistant, Foreign Broadcast Intelligence Service, Federal Communications Commission (Dodd Fdg. 2; R. 29, 34).

On February 9, 1943, the United States House of Representatives (78th Cong., 1st Sess.) adopted H. Res. 105, pursuant to which a special subcommittee of the Committee on Appropriations was appointed to investigate charges that "certain persons" in the executive branch of the Government were "unfit to continue in such employment" (Fdgs. 5; R. 20–21, 25–27, 30–31; 89 Cong. Rec. 734, 742). Following such investigation, the subcommittee reported to the Committee on Appropriations that respondents were "unfit" to be Government employees. The Committee approved these findings. On May 14, 1943, it submitted its report (H. Rep. No. 448, 78th Cong., 1st Sess.) and offered an amendment to the Urgent Deficiency Appropriation Bill, 1943, which, with modifications not here material, was enacted as Section 304 of the Urgent Deficiency Appropriation Act, 1943, *supra* (Fdgs. 5, 6;

Findings by number preceded by the name of a respondent refer to the designated respondent only; findings by number not designated by the name of a particular respondent refer to all the respondents.

R. 21–22, 26–28, 30–32).[3] The President did not appoint any of the respondents pursuant to the provision made for such appointment in Section 304 (Fdgs. 6; R. 22, 28, 31–32).

Respondent Lovett continued in the office of Executive Assistant to the Governor of the Virgin Islands until March 13, 1944 (Lovett Fdg. 3; R. 19); respondents Watson and Dodd continued in their respective positions with the Federal Communications Commission until November 21, 1943 (Watson Fdgs. 3, 7, Dodd Fdgs. 3, 7; R. 24, 28–29, 32). Because of the provisions of Section 304 of the Urgent Deficiency Appropriation Act, 1943, *supra*, "and the fact that the President did not appoint [them] thereunder", none of the respondents received any salary or other compensation for services rendered by him after November 15, 1943 (Lovett Fdgs. 7–10, Watson Fdgs. 7–8, Dodd Fdgs. 7–8; R. 22–24, 28–29, 32–33). On December 3, 1943, the respondents filed their respective petitions in the Court of Claims and on September 27, 1944,

[3] President Roosevelt signed the Act on July 12, 1943. On September 14, 1943, in a message to the Congress, President Roosevelt stated that he had felt obliged to approve the Act because it appropriated funds essential to the conduct of the activities of the Government during the recess of the Congress, but that he had done so reluctantly because he believed Section 304 to be "not only unwise and discriminatory, but unconstitutional" both as a bill of attainder and as an unwarranted encroachment upon the authority of both the executive and judicial branches under the Constitution. 89 Cong. Rec. 7521.

respondent Lovett filed his amended petition (R. 1–17). Respondents Watson and Dodd sought to recover the amounts of their salaries for the period from November 16 to November 21, 1943, inclusive (R. 7, 11–13, 17); respondent Lovett, the amount of his salary for the period from November 16, 1943, to March 13, 1944, inclusive (R. 1, 6–7).

On December 6, 1943, the Attorney General advised the Congress that he concurred in the President's opinion (*supra*, fn. 3) that Section 304 of the Urgent Deficiency Appropriation Act, 1943, was unconstitutional, that he found it "impossible to advocate with conviction the views of the Congress", and that in the circumstances he felt "that the Congress should be afforded an opportunity to be represented by their own counsel". H. Rep. No. 1117, 78th Cong., 2d Sess., pp. 3–4; S. Rep. No. 724, 78th Cong., 2d Sess., p. 3.

On December 18, 1943, H. Res. 386 was agreed to by the House (78th Cong., 1st Sess.), authorizing the special subcommittee appointed by the Committee on Appropriations pursuant to H. Res. 105 "to appoint counsel to represent the United States in the Court of Claims and in any appellate proceedings resulting therefrom in the actions * * * in said Court" theretofore filed by respondents Lovett, Watson, and Dodd. 89 Cong. Rec. 10882. Counsel thus appointed by the special subcommittee appeared in the Court of Claims as *amici curiae* (R. 34) and contended, *inter alia*, in

opposition to the contentions of respondents, that Section 304 was a valid exercise of the constitutional power of Congress; that Congress in enacting it exercised its plenary powers of appropriation; that it was neither an encroachment upon the powers of the executive branch nor a bill of attainder; and that it did not deny respondents due process of law.[4] The petitioner, in a brief filed by the Department of Justice, took the position that Section 304 is an unconstitutional infringement of the executive power of removal and is probably also unconstitutional as a bill of attainder.

The court below, all five members participating, was unanimous in entering judgments for the respondents (R. 33, 41–42, 44, 48–49), finding that each could recover the amount of money which had been withheld from him, in payment for the services rendered by him after November 15, 1943, "solely because of the operation of said Section 304 and the fact that the President did not appoint him thereunder" (Lovett Fdg. 10, Watson Fdg. 8, Dodd Fdg. 8; R. 24, 29, 33). Chief Justice Whaley, in delivering "the opinion of the Court" (R. 33), in

[4] Special Counsel also contended that the Court of Claims lacked jurisdiction; that the claims were not of a justiciable character; and that if the court passed on the question of the constitutionality of Section 304, it must also necessarily determine whether that Section was separable from the remainder of the Act of which it was a part.

which Judge Littleton concurred (R. 41),[5] did not pass on the questions which had been raised as to the constitutionality of Section 304 and held that Section 304 had not terminated the respondents' services (R. 36–37, 40–41), but had merely prohibited the disbursing agencies from paying their salaries (R. 37–38); that such prohibition, however, did not extend to the Court of Claims (R. 39); and that, since Section 304 had not destroyed the obligation to pay for services rendered by the respondents after November 15, 1943, they were entitled to judgment (R. 40–41).

The majority of the court below, however, in three separate opinions (R. 41, 42, 44), held that Section 304 was unconstitutional. Judges Whitaker and Madden held that it was a bill of attainder (R. 41–42, 46). Judge Whitaker found it "unnecessary to consider the other constitutional objections to it" (R. 42); Judge Madden held further that Section 304 was violative of the Fifth Amendment (R. 46–47). Judge Jones held that "Section 304 in making a permanent ban on the rights and privileges of the [respondents] exceeds the authority delegated to the Congress by the Constitution" (R. 44).

REASONS FOR GRANTING THE WRIT

It is submitted that "the opinion of the court" below was in error in holding that Section 304

[5] It is not clear whether or not Judge Madden also concurred in "the opinion of the court," as distinct from the result reached. See R. 44.

of the Urgent Deficiency Appropriation Act, 1943, had not terminated the respondents' services but had merely prohibited the disbursing agencies from paying their salaries. In our opinion, therefore, the question as to the constitutionality of Section 304 must be decided. Although this Department is still of the view that the Section is unconstitutional, we have been requested by the Special Counsel appointed by the subcommittee of the House Committee on Appropriations to file this petition for certiorari so that the question as to the liability of the United States may be brought to this Court. We agree with Special Counsel that the questions presented are worthy of review on certiorari. Authoritative decision by this Court of the questions presented is of the highest importance to the Government of the United States, and particularly to its executive and legislative branches.

1. Section 304, in terms merely a denial of an appropriation for a particular purpose, must be construed in accordance with the actual intention of Congress. *United States* v. *Mitchell*, 109 U. S. 146; *United States* v. *Langston*, 118 U. S. 389; *Dunwoody* v. *United States*, 143 U. S. 578; *United States* v. *Vulte*, 233 U. S. 509; *United States* v. *Dickerson*, 310 U. S. 554; *Markham et al* v. *Cabell*, No. 76, this Term, decided December 10, 1945. It is patent that Congress by Section 304 intended to destroy the substantive obligation to pay respondents their salaries by removing them from

office, and not merely to prohibit the discharge of that obligation. Section 304 not only forbids the use of any appropriation for the payment of respondents' compensation, but also provides a particular means by which respondents could have been appointed to their positions so as to entitle them to compensation out of congressional appropriations, namely, by appointment by the President, by and with the advice and consent of the Senate, prior to November 15, 1943. Such a provision for appointment would be superfluous if the respondents were not, by Section 304, being ousted from their positions. Nor does Section 304 limit its prohibition as to the use of appropriations to appropriations made available by the Act of which it is a part or which had prior to its passage been made available. It also provides that no appropriation "which is hereafter" made available "under or pursuant to any other Act" can be used for the purpose of paying respondents' compensation.[6] Such language cer-

[6] In "the opinion of the court" below, Chief Justice Whaley and Judge Littleton indicated (R. 35) that the validity of this provision of Section 304, forbidding the use of future appropriations to pay respondents' compensation, was at least questionable, that it was not, however, before them for decision, and that its invalidity did not vitiate the entire section. Regardless of what the effect of the invalidity of the future appropriations provision may be upon the section as a whole, it seems clear that the section as a whole, even its more obviously invalid portions, may be examined for the purpose of determining the congressional intent in enacting the section.

tainly is not consistent with a desire merely to limit the purposes for which appropriated funds may be used. Furthermore, since the mere withholding of an appropriation without abolishing respondents' offices or removing respondents from their offices would not affect the respondents' legal right to their salaries, enforceable in court (*United States* v. *Langston*, 118 U. S. 389), it is not to be believed that Congress, in enacting Section 304, was simply refusing to appropriate that which it knew was due to respondents. See *Belknap* v. *United States*, 150 U. S. 588, 595.

Moreover, the legislative history of Section 304 is replete with evidence that the real purpose of the Congress was to remove respondents from office. Cf. *United States* v. *Dickerson, supra.* H. Res. 105, 89 Cong. Rec. 734, 742, authorized a special subcommittee appointed by the Chairman of the Committee on Appropriations to examine into charges that certain employes in the executive branch "are unfit to continue in such employment" because of their association with organizations "'subversive to the Government of the United States". The special subcommittee, in reporting to the Committee on Appropriations, stated, with respect to respondent Lovett, its

> * * * conviction that this official is unfit to hold a position of trust with this Government by reason of his membership, association, and affiliation with organizations whose aims and purposes are sub-

versive to the Government of the United States.

If this official is continued in office he will be in position to propagate his subversive philosophies through control of Government money spent in the Virgin Islands and otherwise influence the native mind through his Government position. (H. Rep. 448, 78th Cong., 1st Sess., p. 12.)

The subcommittee concluded that respondent Lovett "is unfit to continue in the employment of the United States" (*Ibid.*). Similar conclusions were reached by the special subcommittee with respect to respondents Watson and Dodd (*Id.*, pp. 5–7). The Committee on Appropriations approved the findings of its special subcommittee (*Id.*, p. 1) and offered an amendment to the Urgent Deficiency Appropriation Bill, 1943 (*Id.*, p. 2), which, with modifications not here material, was enacted as Section 304 of the Urgent Deficiency Appropriation Act, 1943.

It is thus clear that the congressional proponents of Section 304 considered respondents unfit to hold public office because of their "subversive" activities. If Section 304 is construed as merely withholding appropriations for the payment of respondents' salaries while permitting them to hold their respective offices, it will not remedy the situation to which it was directed. It would then permit persons found to be unfit for government employment by reason of their "subversive"

activities to continue in government employment and there be in a position to "propagate" their philosophies and to subvert the Government instead of serving it. Such a paradoxical intent cannot be imputed to the Congress.

It is noteworthy that the House of Representatives, in adopting H. Res. 105, not only contemplated the enactment of legislation such as Section 304, but also contemplated its enactment as part of an appropriation bill, and, indeed, contemplated that such legislation would have the effect of "changing existing law" and therefore could not, under Clause 2 of House Rule XXI, be made part of a general appropriation bill. To overcome this obstacle and thus permit the enactment in an appropriation bill of legislation dealing with matters not germane to appropriations, the ousting of respondents from their positions, H. Res. 105 provided:

> Any legislation approved by the committee as a result of this resolution may be incorporated in any general or special appropriation measure emanating from such committee or may be offered as a committee amendment to any such measure notwithstanding the provisions of clause 2 of rule XXI. (89 Cong. Rec. 734.)

And it may be noted further that the Committee on Appropriations, in recommending the inclusion of Section 304 in the bill which became the Urgent Deficiency Appropriation Act, 1943, ad-

verted to this very authority to include in an appropriation bill matter which would otherwise have been out of order under Clause 2 of House Rule XXI (H. Rep. 448, 78th Cong., 1st Sess., p. 2). In these circumstances, the congressional intent to do more than cut off appropriations for the payment of respondents' salaries cannot be questioned.

2. It is submitted, therefore, that the rights of respondents to recover compensation for their services rendered after November 15, 1943, cannot be adjudicated without reaching the question of the constitutionality of Section 304. This is a question of grave importance. In his message to the Congress (*supra*, fn. 3) following his reluctant signing of the Urgent Deficiency Appropriation Act, 1943, President Roosevelt stated he believed Section 304 to be "not only unwise and discriminatory, but unconstitutional". 89 Cong. Rec. 7521. He stated further that it was an "unwarranted encroachment upon the authority of both the executive and judicial branches under our Constitution. It is not, in my judgment, binding upon them." *Ibid.* Consistently with this opinion of the Chief Executive, and agreeing with it as a matter of law, the Department of Justice took the position in the court below that Section 304 unconstitutionally infringed the executive power of removal and was probably also unconstitutional as a bill of attainder (*supra*, p. 7). Counsel, appointed pursuant to H. Res.

386) by the special subcommittee of the Committee on Appropriations, sought to sustain the constitutionality of Section 304 (*supra*, p. 7). While the court below was unanimous in awarding judgments to the respondents (*supra*, p. 7), the four opinions filed in that court (R. 33–48) indicate wide divergences among the members of the court as to the basis for these awards (*supra*, pp. 7–8). Indeed, we are advised that the special subcommittee of the House Committee on Appropriations is concerned over the indecisive effect of the divergent opinions below and is reluctant to recommend the appropriation of funds necessary to pay the judgments entered in favor of the respondents, in the absence of a clear ruling on the question of constitutionality. The divergent views of the executive and legislative branches of the Government, as well as the divergent opinions filed in the court below, even by the majority of the court who agreed as to the unconstitutionality of Section 304, make it important that this Court decide the issues presented.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. HOWARD MCGRATH,
Solicitor General.

FEBRUARY 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946

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Nos. 809, 810, 811

In the Supreme Court of the United States

OCTOBER TERM, 1945

UNITED STATES, PETITIONER

v.

ROBERT MORSS LOVETT

UNITED STATES, PETITIONER

v.

GOODWIN B. WATSON

UNITED STATES, PETITIONER

v.

WILLIAM E. DODD, JR.

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE PETITIONER

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	4
Statement	5
Argument	10
I. Section 304 of the Urgent Deficiency Appropriation Act, 1943, is an unconstitutional infringement of the executive power of removal	10
A. Section 304 was actually an attempt to remove respondents from office	10
B. The power to remove the incumbents of offices in the executive branch is an executive function and may not be exercised by the legislature	15
1. The express grant to Congress of the impeachment power negatives any other removal power in Congress	17
2. The vesting of the executive power in the President and the specific grant to him of power to appoint confers upon him the power to remove	20
3. The practice under the Constitution negatives any direct removal power in Congress	32
4. The spending power does not embrace a legislative removal power	48
C. Whether respondents are deemed "officers" or "employees" is immaterial here	52
II. Section 304 of the Urgent Deficiency Appropriation Act, 1943, is unconstitutional as a bill of attainder	57
A. Background of the prohibition against bills of attainder	57
B. The decisions of this Court	62
Conclusion	72

CITATIONS

Cases

Ashwander v. *United States*, 297 U. S. 288	46
Attorney General v. *Varnum*, 167 Mass. 477, 46 N. E. 1	29
Barker v. *People*, 3 Cowen (N. Y.) 686	66
Baskins v. *United States*, 32 F. Supp. 518	56

691035—46——1

Cases—Continued

	Page
Belknap v. *United States*, 150 U. S. 588	12
Blake v. *United States*, 103 U. S. 227	27, 38
Brown v. *Zerbst*, 99 F. (2d) 745	58
Burnap v. *United States*, 252 U. S. 512	21
Butler v. *Pennsylvania*, 10 How. 402	27
Calder v. *Bull*, 3 Dall. 386	57, 59, 60,
Callahan v. *United States*, 122 F. (2d) 216	53, 57
Carr v. *Gordon*, 82 Fed. 373	27
Casebeer v. *Hudspeth*, 121 F. 2d 914	71
Cincinnati Soap Co. v. *United States*, 301 U. S. 308	49
City of Evansville v. *State ex rel. Blend*, 118 Ind. 426, 21 N. E. 267	29
Collins v. *United States*, 14 C. Cls. 568	53
Cooper v. *Telfair*, 4 Dall. 14	62
Crane v. *New York*, 239 U. S. 195	66
Crenshaw v. *United States*, 134 U. S. 99	27, 28
Cummings v. *Missouri*, 4 Wall. 277	59, 62, 65, 68, 70, 72
Davis v. *United States*, 247 Fed. 394	71
Dent v. *West Virginia*, 129 U. S. 114	66
Dunwoody v. *United States*, 143 U. S. 578	10
Emergency Fleet Corp. v. *Western Union Telegraph Co.*, 275 U. S. 415	55
Ervine's appeal, 16 Pa. St. 256	70
Ex Parte Curtis, 106 U. S. 371	66
Ex parte Garland, 4 Wall. 333	62, 65, 72
Ex parte Grossman, 267 U. S. 87	91, 23
Ex parte Wall, 107 U. S. 265	66
Ex parte William Wells, 18 How. 307	19, 23
Ex parte Wilson, 114 U. S. 417	66
Foshay v. *United States*, 54 F. (2d) 668	56
Gaines v. *Washington*, 277 U. S. 81	71
Glasser v. *United States*, 315 U. S. 60	71
Gray v. *McLendon*, 134 Ga. 224, 67 S. E. 859	66
Hawker v. *New York*, 170 U. S. 189	68
Heim v. *McCall*, 239 U. S. 175	66
Helvering v. *Davis*, 301 U. S. 619	49
Helvering v. *Powers*, 293 U. S. 214	56
Hennen, Matter of, 13 Pet. 230	21
Hoeppel v. *United States*, 85 F. (2d) 237	53
Huber v. *Reily*, 53 Pa. St. 112	66
Humphrey's Executor v. *United States*, 295 U. S. 602	15, 27, 29, 30, 32, 45
Johnson v. *Zerbst*, 304 U. S. 458	71
Justices v. *Harcourt*, 4 B. Mon. (Ky.) 499	29
Keim v. *United States*, 177 U. S. 290	21
Kirby v. *United States*, 174 U. S. 47	71
Lessee of Delancey v. *McKeen*, 1 Wash. C. C. 354	62

Cases—Continued

	Page
Lessee of Hylton v. *Brown*, 1 Wash. C. C. 298	62
Mackin v. *United States*, 117 U. S. 348	66
Markham et al. v. *Cabell*, No. 76, this Term	10
McCormick v. *Thatcher*, 8 Utah 294, 30 Pac. 1091	29
McGrath v. *United States*, 275 Fed. 294 appeal dismissed, 260 U. S. 709	53
Metcalf & Eddy v. *Mitchell*, 269 U. S. 514	53, 55
Morgan v. *Tennessee Valley Authority*, 115 F. (2d) 990 certiorari denied, 312 U. S. 701	46
Motes v. *United States*, 178 U. S. 458	71
Myers v. *United States*, 272 U. S. 52	19, 21, 22, 23, 24, 26, 27, 28, 30, 32, 33, 34, 36, 43
Newland v. *Marsh*, 19 Ill. 376	70
Opinion of the Justices, 302 Mass. 605, 19 N. E. (2d) 807	29
Parsons v. *United States*, 167 U. S. 324	40
People v. *Tremaine*, 252 N. Y. 27	50
People ex rel. Barby v. *Howland*, 155 N. Y. 270	50
People ex rel. Nichols v. *McKee*, 68 N. C. 429	29
People ex rel. Walker v. *Bledsoe*, 68 N. C. 457	29
Pierce v. *Carskadon*, 16 Wall. 234	65
Pratt v. *Breckinridge*, 112 Ky. 1, 65 S. W. 136	29
Prentis v. *Atlantic Coast Line Co.*, 211 U. S. 210	70
Priddie v. *Thompson*, 82 Fed. 186	27
Reagan v. *United States*, 182 U. S. 419	21
Reid v. *Smoultee*, 128 Pa. St. 324	50
Reynolds v. *McArthur*, 2 Pet. 417	70
Shoemaker v. *United States*, 147 U. S. 282	28
Shurtleff v. *United States*, 189 U. S. 311	21, 27
Sleght v. *Kane*, 2 Johns. Cas. (N. Y.) 236	62
State v. *Hastings*, 37 Neb. 96, 55 N. W. 774	59
State ex rel. Atty. Gen. v. *Kenyon*, 7 Ohio St. 546	29
State ex rel. Howerton v. *Tate*, 68 N. C. 546	29
State ex rel. Jamison v. *Denny*, 118 Ind. 382, 21 N. E. 252	29
State ex rel. Tolerton v. *Gordon*, 236 Mo. 142	51
State ex rel. White v. *Barker*, 116 Iowa 96, 89 N. W. 204	29
State ex rel. Worrell v. *Carr*, 129 Ind. 44	59
State ex rel. Worrell v. *Peelle*, 121 Ind. 495, 22 N. E. 654	29
State ex rel. Yancey v. *Hyde*, 121 Ind. 20, 22 N. E. 644	29
Steward Machine Co. v. *Davis*, 301 U. S. 548	49–51
Taylor v. *Commonwealth*, 3 J. J. Marshall (Ky.) 401	29
Taylor v. *Stevenson*, 2 Idaho 166, 9 Pac. 642	29
Thompson v. *Carr*, 5 N. H. 511	62
United States v. *Butler*, 297 U. S. 1	49
United States v. *Cooper*, 4 Dall. 341	71
United States v. *Cruikshank*, 92 U. S. 542	71
United States v. *Dickerson*, 310 U. S. 554	10, 12
United States v. *Ferreiro*, 13 How. 40	28
United States v. *Germaine*, 99 U. S. 508	53, 54, 56

Cases—Continued Page

United States v. *Hartwell*, 6 Wall. 385 ..... 53, 56
United States v. *Klein*, 13 Wall. 128 50
United States v. *L. Cohen Grocery Co.*, 255 U. S. 81 71
United States v. *Langston*, 118 U. S. 389 ..... 10, 12
United States ex rel. Crow v. *Mitchell*, 89 F. (2d) 805 55
United States v. *Mitchell*, 109 U. S. 146 10
United States v. *Mouat*, 124 U. S. 303 ..... 53, 54, 55
United States v. *Perkins*, 116 U. S. 483 ..... 34, 44
United States v. *Smith*, 124 U. S. 525 53
United States v. *Smith*, 286 U. S. 6 43
United States v. *Vulte*, 233 U. S. 509 10
United States v. *Waddell*, 112 U. S. 76 66
Waddle v. *Hughes*, 260 Ky. 269 56
Wallace v. *United States*, 257 U. S. 541 21
Ware v. *United States*, 4 Wall. 617 27

Constitution of the United States:

Article I:

Sec. 2, cl. 5 17
Sec. 3, cls. 6, 7 17
Sec. 8, cl. 1 48
Sec. 8, cl. 18 56
Sec. 9, cl. 3 57
Sec. 10, cl. 1 57

Article II:

Sec. 1 21
Sec. 2, cl. 1 54
Sec. 2, cl. 2 ..... 20, 27, 52
Sec. 4 ..... 17, 66

Article III, Sec. 3, cl. 2 59

Statutes and Resolutions:

1. Federal:

Act of August 7, 1789 (1 Stat. 50, 53) 23
Act of September 2, 1789 (1 Stat. 65) 45
Act of March 3, 1817 (3 Stat. 366) 43
Act of January 31, 1823 (3 Stat. 723) 37
Act of July 2, 1836 (5 Stat. 80) 36
Act of July 2, 1862 (12 Stat. 502) 63
Act of July 17, 1862 (12 Stat. 594, 596) 38
Act of January 24, 1865 (13 Stat. 424) 63
Act of March 3, 1865 (13 Stat. 487, 490) 66
Act of March 2, 1867 (14 Stat. 485–487) 39
Act of April 5, 1869 (16 Stat. 6) 40
Act of July 12, 1876 (19 Stat. 78, 80) 24
Act of March 3, 1887 (24 Stat. 500) 40
Act of July 31, 1894 (28 Stat. 162, 205) 42
Act of March 4, 1909, 35 Stat. 1088, 18 U. S. C. 2 66
Act of June 10, 1921 (42 Stat. 20, 31 U. S. C. 41, 43) 44

Statutes and Resolutions—Continued

1. Federal—Continued

Page

Emergency Relief Appropriation Act, for 1942 (55 Stat. 396) 47

Federal Communications Act of 1934 (48 Stat. 1064, 47 U. S. C. 151 et seq.):

Sec. 4 (f) 54

Sec. 205 (a) 31

Sec. 209 31

Sec. 220 (j) 31

Sec. 303 31

Sec. 307 31

Sec. 312 31

H. Res. 105 (78th Cong., 1st sess.) 8, 12, 14

H. Res. 386 (78th Cong., 1st sess.) 8

Independent Offices Appropriation Bill, 1943 (H. Res. 6430, 77th Cong., 2d Sess.) 47

Organic Act of the Virgin Islands, Act of June 22, 1936, as amended (49 Stat. 1807 48 U. S. C. 1405 et seq.):

Sec. 5 31

Sec. 6 31

Sec. 7 31

Sec. 20 31

Sec. 21 54

Sec. 23 54

Sec. 25 31

Sec. 26 31

Tennessee Valley Authority Act (48 Stat. 58, as amended) 16 U. S. C. 831 et seq.) 45

Sec. 4 46

Sec. 6 46

Tenure of Office Act of May 15, 1820 (3 Stat. 582) 36

Tenure of Office Act of March 2, 1867 (14 Stat. 430) 39

Urgent Deficiency Appropriation Act, 1943 (57 Stat. 431, 449, 450):

Sec. 301 69

Sec. 304 ..... 3, 4, 6, 11, 15, 67, 68, 69, 70

2. State:

Conn. Const., Art. VI, secs. 3, 4 66

Del. Const., Art. 11, sec. 21 67

Georgia Acts of March 1, 1778, and May 4, 1782, Vol. 1, Revolutionary Records of Ga., pp. 326, 373 62

Ga. Const., Art. II sec. 4 67

Kan. Gen. Stat. Ann. (1935), sec. 21-121 67

Statutes and Resolutions—Continued

2. State—Continued

Page

Ky. Const., sec. 150 67
Mo. Rev. Stat. Ann. (1939), sec. 4311 67
Neb. Const., Art. XV, sec. 2 67
Neb. Rev. Stat. (1943), sec. 28-811 67
N. H. Act of November 28, 1778, N. H. Perpetual Laws (1789), p. 85 62
1 Laws N. Y. 173, 3d sess. (1779) c. 25 62
1 Laws N. Y. 772 (7th sess. (1784), c. 66) 62
Pa. Laws 1778, c. 19, 1 Pa. Laws (Dall.), c. 781 62
8 R. I. Colonial Records 609 62

3. English:

7 Anne, c. 21 58
5 Eliz., c. 1, c. 11 58
18 Eliz., c. 1 58
8 and 9 Wm. III, c. 26 58
12 and 13 Wm. III, c. 3 18
9 Geo. I, c. 17 61
15 Geo. II, c. 28 58
17 Geo. II, c. 39 59
30 Geo. III, c. 93 59
54 Geo. III, c. 145 59
33 and 34 Vict., c. 23 59

Legislative materials:

1. Committee Reports:

H. Rep. No. 130, 73d Cong., 1st sess. 46
H. Rept. 448, 78th Cong., 1st sess., pp. 1, 2, 5-7, 12 ..... 6, 13, 15
H. Rep. No. 773, 77th Cong., 1st sess., p. 10 48
H. Rep. No. 2259, 77th Cong., 2d sess., p. 3 48
H. Rep. No. 1117, 78th Cong., 2d sess., pp. 3-4 7
H. Rep. No. 2641, 77th Cong., 2d sess., p. 1 48
S. Rep. No. 23, 73d Cong., 1st sess. 46
S. Rep. No. 721, 78th Cong., 2d sess. 7

2. Journals:

Journals of the Continental Congress:

Vol. 4, p. 361 22
Vol. 13, pp. 32-33 22
Vol. 14, pp. 542, 712, 714 22
Vol. 18, pp. 1085, 1115 22

3. Debates:

1. Annals of Congress:

p. 372 56
p. 376 21
p. 381 21
pp. 463, 464 ..... 23, 33
p. 491 21

Legislative materials—Continued
3. Debates—Continued
1. Annals of Congress—Continued
Page
p. 492 21
p. 495 33
p. 496 33
p. 499 33
p. 581 33
p. 582 33
pp. 611–612 45
p. 614 45
77 Cong. Globe:
p. 255 41
p. 256 41
pp. 282, 283 41
pp. 284–285, 289–290 41
p. 335 41
59 Cong. Rec.:
p. 8609 44
65 Cong. Rec.:
p. 1719 42
p. 1730 42
p. 1731 42
pp. 1981–1982 42
pp. 2072–2080 42
p. 2169 42
p. 2245 42
p. 2335 42
p. 4011 42
p. 4744 46
pp. 5031, 5036 46
pp. 5041–5043 46
p. 5243 42
69 Cong. Rec.:
p. 5054 42
p. 5145 42
p. 5155 42
71 Cong. Rec.:
pp. 1007–1028 42
74 Cong. Rec.:
p. 1929 43
83 Cong. Rec.:
p. 3474 46
84 Cong. Rec.:
pp. 4308–4346 46

Legislative materials—Continued
3. Debates—Continued
87 Cong. Rec.:
p. 4677
p. 9494
88 Cong. Rec.:
pp. 3997–4004
89 Cong. Rec.:
p. 711
pp. 734–742
pp. 5602–5606
pp. 6407–6416
pp. 6691–6695
pp. 6729–6738
p. 6839
pp. 7003–7014
p. 7521
p. 10882
4. Bills
H. R. 4590, 77th Cong., 1st sess.
H. R. 6159, 77th Cong., 1st sess.
H. R. 6430, 77th Cong., 1st sess.
H. R. 7505, 77th Cong., 1st sess.
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Vol. I, p. 365 *et seq.*
II Arnold, *History of Rhode Island*, pp. 360, 449
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Vol. I, 21 pp. 78, 230
Vol. II, pp. 185, 428–429, 550
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Treatises—Continued — Page

Hart, *Tenure of Office under the Constitution*, pp. 186, 301, 304 — 29

Haynes, *Senate of the United States*, pp. 725, 812, 812-815 — 37, 39

III Hinds, *Precedents of the House of Representatives* (1907), pp. 1006-1007 — 41

Keir, *Constitutional History of Modern Britain*, pp. 299, 303, 304 — 19

I Kent, *Commentaries*, Lecture 14, p. 319 — 33

Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153 — 43

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II Marshall, *Life of Washington* (2d ed.), p. 162 — 35

I May, *Constitutional History of England*, ch. 1 — 19

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I *Private Correspondence of Daniel Webster* (1857 ed.), p. 487 — 35

Vol. IV, p. 198, — 35

Order of the Secretary of the Interior, No. 1870 — 54

II Ramsay, *History of South Carolina*, p. 551 — 62

Richardson, *Messages and Papers of the Presidents*

Vol. III, p. 133 — 38

Vol. V, p. 192 — 40

Vol. VII, pp. 38, 531 — 16, 40

Vol. VIII, p. 579 — 32

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II Story, *Commentaries on the Constitution* (5th ed., 1891)

Sec. 1344 — 61

Sec. 1535 — 28

Sec. 1536 — 56

Sec. 1543 — 35

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V Thorpe, *Federal and State Constitutions* (1909), p. 3088 — 18

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III Willoughby, *Constitutional Law* (2d ed. 1929), Secs. 692, 991, 992, 1526 — 28, 44, 66

Miscellaneous:

Articles of Confederation, Art. IX — 22

Federal Communications Commission, Seventh Annual Report (1941), pp. 1-6 — 32

15 Harv. L. Rev. 1246, note 51 — 45

House Rule XXI, cl. 2 — 15

Miscellaneous—Continued
Opinions of the Attorney General: Page
1 Op. A. G. 624, 629 45
3 Op. A. G. 186 28
4 Op. A. G. 603, 609–610 23
8 Op. A. G. 223, 232 21
12 Op. A. G. 32, 37 28
13 Op. A. G. 516, 520 27, 28
15 Op. A. G. 421 38
40 Op. A. G. No. 74 53
Order of the Secretary of the Interior, No. 1870 54
State Trials:
Vol. 2, p. 1087 20
Vol. 3, pp. 1382, 1518 61
Vol. 6, pp. 291, 318, 391 20, 61
Vol. 16, pp. 323, 767 20, 61

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OPINIONS BELOW

The opinions in the Court of Claims (R. 33–48) have not yet been officially reported.

JURISDICTION

The judgments of the Court of Claims were entered on November 5, 1945 (R. 33, 41, 48–49). The petition for writs of certiorari was filed on February 5, 1946, and granted on March 25, 1946. The jurisdiction of this Court rests upon Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED

The United States, against which judgments were rendered in the court below, has sought review of these cases because of the Government's belief that important constitutional issues are involved which should be determined by this Court and because *amici curiae*, representing the Congress (see *infra*, p. 8), have no independent means of access to the Court. It requested that a petition for writs of certiorari be filed.

The Solicitor General, taking the view previously adopted by the President (see *infra* n. 3) and the Attorney General (*infra* p. 8), here argues that Section 304, considered as an attempted exercise of a legislative power of removal and as imposing a disqualification for office upon the respondents, is unconstitutional. He accordingly concludes, in support of the respondents, that the judgments of the Court of Claims should be

affirmed for other reasons than those principally relied upon by the court below. The *Amici curiae* contend that the Section is a valid exercise of the legislative power and that the judgments below are wrong. The legislative branch which they represent is therefore the challenger of the judgments below.

The questions presented in this Court are:

1. Whether Section 304 of the Urgent Deficiency Appropriation Act, 1943, 57 Stat. 431, 450, *infra*, undertook to terminate the respondents' services in their government positions and to bar them from any Federal offices thereafter, or whether it merely prohibits disbursing agencies from paying their salaries.

2. If the former, whether Section 304 is unconstitutional as an infringement of the executive power of removal or as a bill of attainder or both.

3. Whether, in view of Section 304 and the failure of the President to appoint respondents thereunder prior to November 15, 1943, the United States incurred a legal obligation to pay respondents for services rendered after that date.

4. Whether the Court of Claims was presented with justiciable controversies.

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[1] Questions 3 and 4 are stated at the request of counsel for the subcommittee of the House Committee on Appropriations.

STATUTE INVOLVED [18]

Section 304 of the Urgent Deficiency Appropriation Act, 1943, 57 Stat. 431, 450, provides as follows:

> SEC. 304. No part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act, or (2) which is now, or which is hereafter made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States, shall be used, after November 15, 1943, to pay any part of the salary, or other compensation for the personal services, of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has been appointed by the President, by and with the advice and consent of the Senate: *Provided*, That this section shall not operate to deprive any such person of payment for leaves of absence or salary, or of any refund or reimbursement, which have accrued prior to November 15, 1943: *Provided further*, That this section shall not operate to deprive any such person of payment for services performed as a member of a jury or as a member of the armed forces of the United States nor any benefit, pension, or emolument resulting therefrom.

[18] The applicable provisions of the Constitution are quoted in the Argument where pertinent.

STATEMENT [2]

In 1939 respondent Lovett was duly appointed the United States Government Secretary of the Virgin Islands. On August 26, 1943, he was duly appointed Executive Assistant to the Governor of the Virgin Islands and entered on duty as such on October 12, 1943 (Lovett Fdgs. 2, 4; R. 19–20, 33). On November 16, 1941, respondent Watson was duly appointed Chief of the Analysis Division, Foreign Broadcast Intelligence Service, Federal Communications Commission (Watson Fdg. 2; R. 24, 33). On December 1, 1941, respondent Dodd was duly appointed Editorial Assistant, Foreign Broadcast Intelligence Service, Federal Communications Commission (Dodd Fdg. 2; R. 29, 34).

On February 9, 1943, the United States House of Representatives (78th Cong., 1st Sess.) adopted H. Res. 105, pursuant to which a special subcommittee of the Committee on Appropriations was appointed to investigate charges that "certain persons" in the executive branch of the Government were "unfit to continue in such

[2] The court below considered and disposed of these three cases together, but made separate findings of fact with respect to each of the three respondents and numbered the findings relating to the several respondents in separate, correspondingly numbered series. Findings by number preceded by the name of a respondent refer to the designated respondent only; findings by number not preceded by the name of a particular respondent refer to all the respondents.

employment" (Fdg. 5; R. 20–21, 25–27, 30–31; 89 Cong. Rec. 734, 742). Following such investigation, the subcommittee reported to the Committee on Appropriations that respondents were "unfit" to be Government employees. The Committee approved these findings. On May 14, 1943, it submitted its report (H. Rep. No. 448, 78th Cong., 1st sess.) and offered an amendment to the Urgent Deficiency Appropriation Bill, 1943, which, with modifications not here material, was enacted as Section 304 of the Urgent Deficiency Appropriation Act, 1943, *supra* (Fdgs. 5, 6; R. 21–22, 26–28, 30–32).[3] The President did not appoint any of the respondents pursuant to the provision made for such appointment in Section 304 (Fdg. 6; R. 22, 28, 31–32).

Respondent Lovett continued in the office of Executive Assistant to the Governor of the Virgin Islands until March 13, 1944 (Lovett Fdg. 3; R. 19); respondents Watson and Dodd continued in their respective positions with the Federal Communications Commission until November 21,

[3] President Roosevelt signed the Act on July 12, 1943. On September 14, 1943, in a message to the Congress, he stated that he had felt obliged to approve the Act because it appropriated funds essential to the conduct of the activities of the Government during the recess of the Congress, but that he had done so reluctantly because he believed Section 304 to be "not only unwise and discriminatory, but unconstitutional" both as a bill of attainder and as an unwarranted encroachment upon the authority of the executive and judicial branches under the Constitution. 89 Cong. Rec. 7521.

1943 (Watson Fdgs. 3, 7, Dodd Fdgs. 3, 7; R. 24, 28–29, 32). Because of the provisions of Section 304 of the Urgent Deficiency Appropriation Act, 1943, *supra*, "and the fact that the President did not appoint [them] thereunder", none of the respondents received any salary or other compensation for services rendered by him after November 15, 1943 (Lovett Fdgs. 7–10, Watson Fdgs. 7–8, Dodd Fdgs. 7–8; R. 22–24, 28–29, 32–33). On December 3, 1943, the respondents filed their respective petitions in the Court of Claims and, on September 27, 1944, respondent Lovett filed his amended petition (R. 1–17). Respondents Watson and Dodd sought to recover the amounts of their salaries for the period from November 16 to November 21, 1943, inclusive (R. 7, 11–13, 17); respondent Lovett, the amount of his salary for the period from November 16, 1943, to March 13, 1944, inclusive (R. 1, 6–7).

On December 6, 1943, the Attorney General advised the Congress that he concurred in the President's opinion (*supra*, n. 3) that Section 304 of the Urgent Deficiency Appropriation Act, 1943, was unconstitutional, that he found it "impossible to advocate with conviction the views of the Congress", and that in the circumstances he felt "that the Congress should be afforded an opportunity to be represented by their own counsel". H. Rep. No. 1117, 78th Cong., 2d sess., pp. 3–4; S. Rep. No. 724, 78th Cong., 2d sess., p. 3.

On December 18, 1943, H. Res. 386 was agreed to by the House (78th Cong., 1st Sess.), authorizing the special subcommittee appointed by the Committee on Appropriations pursuant to H. Res. 105 "to appoint counsel to represent the United States in the Court of Claims and in any appellate proceedings resulting therefrom in the actions * * * in said Court" theretofore filed by respondents Lovett, Watson, and Dodd. 89 Cong. Rec. 10882. Counsel thus appointed by the special subcommittee appeared in the Court of Claims as *amici curiae* (R. 34) and contended, *inter alia*, that Section 304 was a valid exercise of the constitutional power of Congress; that Congress in enacting it exercised its plenary powers of appropriation; that it was neither an encroachment upon the powers of the executive branch nor a bill of attainder; and that it did not deny respondents due process of law.[4] The Department of Justice took the position that Section 304 was an unconstitutional infringement of the executive power of removal and unconstitutional as a bill of attainder.

The court below, all five members participating, was unanimous in entering judgments for the re-

[4] Special Counsel also contended that the Court of Claims lacked jurisdiction; that the claims were not of a justiciable character; and that if the court passed on the question of the constitutionality of Section 304, it must also necessarily determine whether that Section was separable from the remainder of the Act of which it was a part.

spondents (R. 33, 41–42, 44, 48–49), finding that each could recover the amount of money which had been withheld from him "solely because of the operation of said Section 304 and the fact that the President did not appoint him thereunder" (Lovett Fdg. 10, Watson Fdg. 8, Dodd Fdg. 8; R. 24, 29, 33). Chief Justice Whaley, in delivering "the opinion of the court" (R. 33), in which Judge Littleton concurred (R. 41),[1] did not pass on the questions which had been raised as to the constitutionality of Section 304 and held that Section 304 had not terminated the respondents' services (R. 36–37, 40–41), but had merely prohibited the disbursing agencies from paying their salaries (R. 37–38); that this prohibition, however, did not extend to the payment of judgments of the Court of Claims (R. 39); and that, since Section 304 had not destroyed the obligation to pay for services rendered by the respondents after November 15, 1943, they were entitled to judgment (R. 40–41).

The majority of the court below, however, in three separate opinions (R. 41, 42, 44), held that Section 304 is unconstitutional. Judges Whitaker and Madden held that it is a bill of attainder (R. 41–42, 46). Judge Whitaker found it "unnecessary to consider the other constitu-

[1] It is not clear whether or not Judge Madden also concurred in "the opinion of the court," as distinct from the result reached. See R. 44.

tional objections to it" (R. 42); Judge Madden held further that Section 304 is violative of the Fifth Amendment (R. 46–47). Judge Jones held that "Section 304 in making a permanent ban on the rights and privileges of the [respondents], exceeds the authority delegated to the Congress by the Constitution" (R. 44).

ARGUMENT

I. SECTION 304 OF THE URGENT DEFICIENCY APPROPRIATION ACT, 1943, IS AN UNCONSTITUTIONAL INFRINGEMENT OF THE EXECUTIVE POWER OF REMOVAL

A. SECTION 304 WAS ACTUALLY AN ATTEMPT TO REMOVE RESPONDENTS FROM OFFICE

The "opinion of the court" below held that Section 304 of the Urgent Deficiency Appropriation Act, 1943, had not terminated the respondents' services but had merely prohibited the disbursing agencies from paying their salaries. This holding, we believe, was clearly erroneous.

Section 304, in terms merely a restriction upon the use of appropriated funds, must be construed in accordance with the actual intention of Congress. *United States* v. *Mitchell*, 109 U. S. 146; *United States* v. *Langston*, 118 U. S. 389; *Dunwoody* v. *United States*, 143 U. S. 578; *United States* v. *Vulte*, 233 U. S. 509; *United States* v. *Dickerson*, 310 U. S. 554; *Markham et al.* v. *Cabell*, No. 76, this Term, decided December 10, 1945. It is patent that Congress by Section 304 intended to destroy the substantive obligation to pay re-

spondents their salaries and to remove them from office, and not merely to prohibit the discharge of that obligation in a particular way. Section 304 not only forbids the use of any appropriation for the payment of respondents' compensation, but also provides a particular means—namely, appointment by the President with the advice and consent of the Senate prior to November 15, 1943—by which respondents could have become entitled to compensation out of Congressional appropriations. Such a provision for appointment would have been inappropriate if the respondents were not, by Section 304, being ousted from their positions. Nor is the prohibition of Section 304 limited to appropriations contained in the Act of which it is a part or which had been made available prior to its passage. It extends also to any appropriation "which is hereafter" made available "under or pursuant to any other Act." Such language certainly suggests a complete disqualification of respondents, rather than merely a limitation upon the purposes for which appropriated funds

[*] In "the opinion of the court" below, Chief Justice Whaley and Judge Littleton indicated (R. 35) that the validity of this provision of Section 304, forbidding the use of future appropriations to pay respondents' compensation, was at least questionable; that it was not, however, before them for decision; and that its invalidity would not vitiate the entire section. Regardless of the effect of the invalidity of the future appropriations provision upon the remainder of the section it seems clear that the Section as a whole must be considered in determining the Congressional intent in enacting the Section.

may be used. Furthermore, since the mere withholding of appropriated funds without abolishing respondents' offices or removing respondents from their offices would not affect respondents' legal right to their salaries, enforceable in court (*United States* v. *Langston*, 118 U. S. 389), such a construction of Section 304 would attribute to Congress either an intention to enact a useless measure or the purpose of withholding that which it knew was due to respondents. See *Belknap* v. *United States*, 150 U. S. 588, 595.

The legislative history of Section 304 is replete with evidence that the real purpose of the Congress was to remove respondents from office. Cf. *United States* v. *Dickerson*, *supra*. H. Res. 105, 89 Cong. Rec. 734, 742, authorized a special subcommittee appointed by the chairman of the Committee on Appropriations to examine into charges that certain employes in the executive branch "are unfit to continue in such employment" because of their association with organizations "subversive to the Government of the United States". The special subcommittee, in reporting to the Committee on Appropriations, stated, with respect to respondent Lovett, its

> * * * conviction that this official is unfit to hold a position of trust with this Government by reason of his membership, association, and affiliation with organizations whose aims and purposes are subversive to the Government of the United States.

> If this official is continued in office he will be in position to propagate his subversive philosophies through control of Government money spent in the Virgin Islands and otherwise influence the native mind through his Government position. [H. Rep. 448, 78th Cong., 1st sess., p. 12.]

The subcommittee concluded that respondent Lovett "is unfit to continue in the employment of the United States" (*Ibid.*). Similar conclusions were reached by the special subcommittee with respect to respondents Watson and Dodd (*Id.*, pp. 5–7). The Committee on Appropriations approved the findings of its special subcommittee (*Id.*, p. 1) and offered an amendment to the Urgent Deficiency Appropriation Bill, 1943 (*Id.*, p. 2), which, with modifications not here material, was enacted as Section 304 of the Act.

It is thus clear that the Congressional proponents of Section 304 considered respondents unfit to hold public office because of their "subversive" activities. If Section 304 is construed as merely withholding appropriations for the payment of respondents' salaries while permitting them to hold their respective offices, it will not remedy the situation to which it was directed. It would then permit persons found to be unfit for government employment by reason of their "subversive" activities to continue in government employment and there be in a position to "propagate" their philosophies and to subvert the

Government instead of serving it. Such a paradoxical intent cannot be imputed to the Congress.

It is noteworthy that the House of Representatives, in adopting H. Res. 105, not only contemplated the enactment of legislation such as Section 304, but also contemplated its enactment as part of an appropriation bill, and, indeed, contemplated that such legislation would have the effect of "changing existing law" and therefore could not, under Clause 2 of House Rule XXI, be made part of a general appropriation bill. To overcome this obstacle and thus permit the enactment in an appropriation bill of legislation dealing with matters not germane to appropriations, the ousting of respondents from their positions, H. Res. 105 provided:

> Any legislation approved by the committee as a result of this resolution may be incorporated in any general or special appropriation measure emanating from such committee or may be offered as a committee amendment to any such measure notwithstanding the provisions of Clause 2 of Rule XXI. [89 Cong. Rec. 734.]

And it may be noted further that the Committee on Appropriations, in recommending the inclusion of Section 304 in the bill which became the Urgent Deficiency Appropriation Act, 1943, adverted to this very authority to include in an appropriation bill matter which would otherwise have been out of order under Clause 2 of House

Rule XXI (H. Rep. No. 448, 78th Cong., 1st Sess., p. 2). In these circumstances, the congressional intent to do more than cut off appropriations for the payment of respondents' salaries cannot be questioned.

B. THE POWER TO REMOVE THE INCUMBENTS OF OFFICES IN THE EXECUTIVE BRANCH IS AN EXECUTIVE FUNCTION AND MAY NOT BE EXERCISED BY THE LEGISLATURE

Section 304 embodies a device which in its implications represents a fundamental breach in the principle of separation of powers underlying our whole constitutional system. If the President is to perform his constitutional obligation to execute the laws, he must have power to control the subordinate officers through whom the executive function is administered. The principal control which the President has over executive officers is his power to remove them, and it has been said that "he is * * * Chief of the Executive only through his power of removing appointees who are recalcitrant and unwilling to follow his wishes" (Rogers, *The American Senate*, p. 48n). Any exercise of the removal power by the legislative branch necessarily interferes with the executive power and tends to subject the executive branch to the control and domination of Congress. "For it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will" (*Humphrey's Executor* v. *United States*, 295

U. S. 602, 629). The independence of the executive branch could thus be undermined and the doctrine of separation of powers nullified.

We shall show herein that the removal power of Congress over executive officers is confined to its impeachment powers expressly provided for in the Constitution; that while Congress has power to fix the qualifications for certain offices and to place restrictions under certain circumstances upon the exercise of the President's removal power, the Congress may not itself, by legislative enactment (whether or not in the guise of an appropriation measure), remove persons from office.

The mode of enactment of Section 304 as a rider to an essential appropriation bill is subject to grave objections not herein stressed, since it deprives the President of opportunity to exercise his constitutional functions with respect to legislation. As a practical matter, the exigencies of the public welfare may make it impossible for the President to veto an appropriation bill containing such a rider, even though it is a clear infringement of his constitutional prerogatives. See VII Richardson, *Messages and Papers of the Presidents*, p. 531. The deliberate judgment of the nonoriginating chamber is also foreclosed by this legislative device. Thus, the Senate so strongly felt that this provision was unconstitutional that it four times rejected conference reports on the bill and only acquiesced in the fifth report because of the imperative necessity that the appropriations contained in the bill be made available to the executive departments concerned, since the appropriations for the current fiscal year had expired (89 Cong. Rec. 5602–5606, 6407–6416, 6691–6695, 6729–6738, 6839, 7003–7014). As Senator Barkley put it: "It is unfortunate that we must vote with a pistol held at our heads, because tomorrow at midnight the fiscal year ends and a new one begins" (89 Cong. Rec. 6693).

1. The Express Grant to Congress of the Impeachment Power Negatives any other Removal Power in Congress

The removal power of Congress is not a matter which the Framers of the Constitution left to interpretation or speculation. It was a subject of such moment and importance as to be dealt with expressly in the Constitution. Thus the Constitution confers upon the House of Representatives the "sole Power of Impeachment" (Art. I, Sec. 2, cl. 5); and the "sole Power to try all Impeachments" is placed in the Senate, subject to the safeguards that convictions shall be by "the Concurrence of two-thirds of the Members present" and that the judgment "shall not extend further than to removal from office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States" (Art. I, Sec. 3, cls. 6 & 7).[1] This impeachment process, we submit, was intended to be the sole means by which the legislative branch might remove the personnel of other branches.

Since the Framers dealt expressly with the removal power of Congress in the clause covering impeachment, the normal inference is that no other removal power was intended to be vested in Congress. This inference is buttressed by the

[1] Art. II, Sec. 4 renders "The President, Vice-President and all civil Officers of the United States" subject to removal from office "on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."

fact that, if a direct removal power[9] by simple legislative enactment existed, the impeachment process would be rendered unnecessary and its carefully spelled-out safeguards nullified.

The proceedings of the Constitutional Convention support this conclusion. There, methods of removal by the legislative branch, other than by impeachment, were suggested for adoption and voted down. A proposal for removal of judges by joint address, a procedure having precedent in England,[10] was rejected by the Convention. II Farrand, *Records of the Federal Convention of 1787* (1911), pp. 428–429. Similarly, a proposal for removal "by the national legislature upon a request by a majority of the legislatures of the individual States" was defeated. I Farrand, *supra*, p. 78. Finally, removal by bill of attainder, a method well known to the Framers, was outlawed. See discussion, *infra*, pp. 58–63.

The debate at the Convention upon the scope of the impeachment power is also revealing, for it

[9] As used throughout this brief, the term "direct removal power" refers to a power under which the legislature could by legislative enactment remove a named incumbent from office, as distinguished from (1) a power to remove an officer by impeachment, or (2) a power to require legislative consent to a proposed removal by the President, or (3) a power to limit or control the President's removal power by specifying or limiting the grounds upon which executive officers may be removed.

[10] Act of Settlement of 1701 (12 and 13 Wm. III c. 2); compare V Thorpe, *Federal and State Constitutions* (1909), p. 3088.

shows a broadening of the power in order to meet all the needs of legislative removal, but at the same time a refusal to grant a blanket removal power to the legislature. At one stage of the Convention the proposal was made that the impeachment power might only be invoked in cases of "Treason & bribery." Upon objection that this provision "will not reach many great and dangerous offences" and that such offences could not be dealt with by bills of attainder, impeachment was expanded to cover "other high crimes & misdemeanors." At the same time, however, impeachment was not extended to "maladministration", since, as Madison pointed out, that would have created the "equivalent to a tenure during pleasure of the Senate" (II Farrand, *supra*, p. 550).

The English constitutional system as it existed at the time of the Framing of the Constitution also casts light upon our problem. *Ex parte: William Wells*, 18 How. 307, 311; *Ex parte Grossman*, 267 U. S. 87, 110; *Myers v. United States*, 272 U. S. 52, 118. At this time the power to remove executive officers was vested in the Crown.[11] Par-

[11] Salaries of civil officials were defrayed from the Civil List. A lump sum was voted at the beginning of each reign which was entirely at the King's disposal, and he could remove any person from office merely by striking him from the List. Indeed, no distinction was made between the King's personal and domestic expenditures and payments of salaries to officials (Keir, *Constitutional History of Modern Britain*, pp. 299, 303, 304). George III made removals without consulting either Parliament or his own ministers (I May, *Constitutional History of England*, ch. 1).

liament, of course, had the power to impeach officials (see *e. g.* 2 State Trials 1087; 6 State Trials, 291; 16 State Trials 767), and in times of great political upheaval enacted bills of pains and penalties or attainder which deprived officials of their offices (see discussion, *infra*, pp. 60–62). Parliament also appointed committees of inquiry to investigate the conduct of government officials, but these only resulted in addresses to the Crown for removal. (I Anson, *Law and Custom of the Constitution*, p. 365 *et seq.*; II Todd, *Parliamentary Government*, p. 860 *et seq.*). But Parliament had no way to remove an official by forbidding payment of his salary. The fact that the only way in which Parliament could remove an official was through impeachment or a bill of pains and penalties and the fact that the latter practice was outlawed by the Framers through the prohibition against bills of attainder strongly suggest that under the Federal Constitution Congress was not intended to have the power to remove executive officials otherwise than by impeachment.

2. The Vesting of the Executive Power in the President and the Specific Grant to Him of the Power to Appoint Confer upon Him the Power to Remove.

The impeachment provisions aside, the absence of a direct removal power in Congress is indicated by the specific grant to the executive of the general appointive power. Art. II, Sec. 2,

cl. 2 of the Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." It is well established that, in the absence of specific provisions to the contrary, the power of removal is an incident of the power of appointment.[12] Hence, under the Constitution, the removal power rests in the President and not in Congress.

The same conclusion follows, in the absence of countervailing considerations from the provision of Art. II, Sec. 1 of the Constitution, that "The executive Power shall be vested in a President". The background of this provision shows that the Framers intended to include the power to appoint and to remove. At the Convention, the scope of

[12] *Matter of Hennen*, 13 Pet. 230, 259-260; *Keim* v. *United States*, 177 U. S. 290, 293, 294; *Reagan* v. *United States*, 182 U. S. 419, 424; *Shurtleff* v. *United States*, 189 U. S. 311, 314-315; *Burnap* v. *United States*, 252 U. S. 512, 515; *Wallace* v. *United States*, 257 U. S. 541, 544; *Myers* v. *United States*, 272 U. S. 52, 119 (1926); 8 Op. A. G. 223, 232; Mechem, *Public Offices and Officers* (1890) Sec. 445. See 1 *Annals of Congress* 376, 381, 491, 492.

the executive power was first treated in the Seventh Resolution of the Virginia Plan. This gave to the executive "the Executive rights vested in Congress by the Confederation" (I Farrand, *supra*, p. 21), which presumably included the power of removal assumed by the Congress under the Confederation, Articles of Confederation, Art. IX; 4 Journals of the Continental Congress (Lib. of Cong. ed.), 361; 13 *id.* 32–33; 14 *id.* 542, 712, 714; 18 *id.* 1085, 1115; see *Myers* v. *United States*, 272 U. S. 52, 110. The Committee of the Whole House modified this resolution to provide for a national executive of one person with power to carry into execution the national laws and to appoint to offices in cases not otherwise provided for (I Farrand, *supra*, p. 230). This was referred to the Committee of Detail, which recommended that the executive power should be vested in a president and that he should commission all the officers of the United States and appoint officers in all cases not otherwise provided for by the Constitution (II Farrand, *supra*, p. 185). It was only after the great compromises in the Convention giving the larger States equality of representation in the Senate and providing for the election of the President not by Congress but by an electoral college that the smaller States, led by Roger Sherman, fearing that the President would constantly be chosen from one of the larger States, demanded and obtained a change by which

the appointment of all officers was made subject to the Senate's advice and consent rather than vested in the President without restriction (*Myers* v. *United States*, 272 U. S. 52, 110, 111). But the appointive power, and the removal power incident thereto, remained in the executive.

This conclusion is reinforced by the action of the First Congress in so modifying the Northwest Ordinance of 1787 that the executive powers theretofore exercised by Congress, including the power of removal, were transferred to the President (Act of August 7, 1789, 1 Stat. 50, 53; see discussion, *infra*, p. 36). Moreover, in 1789, as now, the power of appointment and removal of officers clearly was considered an executive function in England. See *Myers* v. *United States*, 272 U. S. 52, at p. 118. Cf. *Ex parte Grossman*, 267 U. S. 87, 108–111; *Ex parte: William Wells*, 18 How. 307. And the debates in the first Congress in 1789 leave no doubt as to the view of the Framers that "the power of displacing" was an executive power. 1 *Annals of Congress* 463; 4 Op. A.-G. 603, 609–610. See discussion, *infra*, pp. 34–36.

In any event, this Court has so decided. *Myers* v. *United States*, 272 U. S. 52, squarely establishes that the power of removal of inferior executive officers is vested exclusively in the executive branch and that an assumption of that power by Congress is beyond its constitutional functions. The case involved the removal from office of a

first class postmaster by the Postmaster General, with Presidential approval, but without referral to the Senate, despite a statutory provision for a four-year term of office, subject to removal "by the President by and with the advice and consent of the Senate" (Act of July 12, 1876, 19 Stat. 78, 80). In holding the provision for Senatorial consent to be an unconstitutional invasion of the executive province, this Court observed (272 U. S. at pp. 117–118, 119, 122):

> The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. * * * As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the absence of any express limitation respecting removals, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible. Fisher Ames, 1 Annals of Congress, 474. It was urged that the natural meaning of the term "executive power" granted the President included the ap-

> pointment and removal of executive subordinates. If such appointments and removals were not an exercise of the executive power, what were they? They certainly were not the exercise of legislative or judicial power in government as usually understood.
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> * * * * * * *
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> The reason for the principle [that the power of appointment carries with it the power of removal] is that those in charge of and responsible for administering functions of government who select their executive subordinates need, in meeting their responsibility to have the power to remove those whom they appoint * * *. The power of removal is incident to the power of appointment, not to the power of advising and consenting to appointment, and when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal.

The opinion further pointed out that the constitutional prerogatives of Congress with respect to appointment and removal of executive officers are limited to the Senate's confirmation of President's nominations to offices requiring such confirmation and to vesting the appointing power with respect to inferior officers in the President, the courts, or the heads of departments. The

granting of these specific powers to Congress, this Court added, excludes by implication any power in it to control the removal of officers, except that Congress, when it vests in the executive branch alone the power of appointing inferior officers, may by general provision limit and regulate executive removal of such officers.

Rejecting the argument that a direct removal power in Congress might be found in the "Necessary and Proper" clause of the Constitution (Art. I, sec. 8), this Court observed (272 U. S. at 127):

> A reference of the whole power of removal to general legislation by Congress is quite out of keeping with the plan of government devised by the framers of the Constitution. It could never have been intended to leave to Congress unlimited discretion to vary fundamentally the operation of the great independent executive branch of government and thus most seriously to weaken it. It would be a delegation by the Convention to Congress of the function of defining the primary boundaries of another of the three great divisions of government. The inclusion of removals of executive officers in the executive power vested in the President by Article II, according to its usual definition, and the implication of his power of removal of such officers from the provision of section 2 expressly recognizing in him the

> power of their appointment, are a much more natural and appropriate source of the removing power.[18]

This Court also declined to find a direct removal power for Congress in the power to "vest" the appointment of inferior officers (Art. II, Sec. 2, cl. 2, *supra*, pp. 21–22), the opinion stating (272 U. S. at 161):

> The authority of Congress given by the excepting clause to vest the appointment of such inferior officers in the heads of departments carries with it authority incidentally to invest the heads of departments with power to remove. It has been the practice of Congress to do so and this Court has recognized that power. The Court also has recognized in the *Perkins*

[18] Of course, under the "Necessary and Proper" clause, Congress may prescribe many of the incidents of Federal employment. Compare *Crenshaw* v. *United States*, 134 U. S. 99, 106. Congress may abolish an office, or the agency in which the office exists (Cf. *Ware* v. *United States*, 4 Wall. 617), and may reduce its emoluments (Cf. *Butler* v. *Pennsylvania*, 10 How. 402, 416) or determine the qualifications for appointment thereto. *Myers* v. *United States*, 272 U. S. 52, 128; III Willoughby, *Constitutional Law* (2d ed. 1929), Sec. 992; Corwin, *The President* (2d ed. rev. 1941) p. 70; 13 Op. A. G. 516, 520. And Congress may, with respect to some positions impose limitations upon the power to remove an incumbent once duly appointed. *Humphrey's Executor* v. *United States*, 295 U. S. 602; *Blake* v. *United States*, 103 U. S. 227; *Shurtleff* v. *United States*, 189 U. S. 311, 314; *Carr* v. *Gordon*, 82 Fed. 373 (C. C. N. D. Ill.); *Priddie* v. *Thompson*, 82 Fed. 186 (C. C. W. Va.). See *infra*, pp. 30–31.

> case that Congress, in committing the appointment of such inferior officers to the heads of departments, may prescribe incidental regulations controlling and restricting the latter in the exercise of the power of removal. But the Court never has held, nor reasonably could hold, although it is argued to the contrary on behalf of appellant, that the excepting clause enables Congress to draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power. To do this would be to go beyond the words and implications of that clause and to infringe the constitutional principle of the separation of governmental powers."[11]

The dissenting Justices in the *Myers* case agreed with the majority of the Court that the act of removal itself (as distinguished from prescribing the condition under which the executive may remove an incumbent) is an executive and not a legislative function (*Myers* case, pp. 186, 245). See also *Springer* v. *Philippine Islands*, 277 U. S. 189, 202; *Crenshaw* v. *United*

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[11] The power to "vest" appointment of inferior officers is otherwise carefully circumscribed, in that Congress may not under this clause vest the power of appointment in itself or in either of its branches. *United States* v. *Ferreira*, 13 How. 40, 50–51; *Shoemaker* v. *United States*, 147 U. S. 282, 300–301; II Story, *Commentaries* (5th ed. 1891), Sec. 1535; III Willoughby, *Constitutional Law* (2d ed. 1929) Sec. 991; 3 Op. A. G. 188; 12 *id.*, 32, 37; 13 *id.* 516.

States, 134 U. S. 99, 109.[15] And writers critical of the *Myers* decision agree that Congress has no power to remove the incumbent of an executive office.[16]

In the later case of *Humphrey's Executor* v. *United States*, 295 U. S. 602, this Court held that Congress could constitutionally restrict the President's power of removal of a member of the Federal Trade Commission by limiting the causes for removal to inefficiency, neglect of duty, or mal-

[15] Many states have also held that the appointing power is executive in nature, and unless conferred on the legislature by the constitution, cannot be exercised by that body. *Taylor* v. *Stevenson*, 2 Idaho 166, 9 Pac. 612; *State ex rel. Jameson* v. *Denny*, 118 Ind. 382, 21 N. E. 252; *City of Evansville* v. *State ex rel. Bland*, 118 Ind. 426, 21 N. E. 267; *State ex rel. Yancey* v. *Hyde*, 121 Ind. 29, 22 N. E. 644; *State ex rel. Worrell* v. *Peelle*, 121 Ind. 495, 22 N. E. 654; *Pratt* v. *Breckinridge*, 112 Ky. 1, 65 S. W. 136; *People ex rel. Nichols* v. *McKee*, 68 N. C. 429; *People ex rel. Walker* v. *Bledsoe*, 68 N. C. 457; *State ex rel. Howerton* v. *Tate*, 68 N. C. 546; *State ex rel. Atty. Gen.* v. *Keenan*, 7 Ohio St. 546; *McCornick* v. *Thatcher*, 8 Utah 294, 30 Pac. 1091; *State ex rel. White* v. *Barker*, 116 Iowa 96, 89 N. W. 204; *Taylor* v. *Commonwealth*, 3 J. J. Marshall (Ky.) 401; *Justices* v. *Harcourt*, 4 B. Mon. (Ky.) 499; *Murphy* v. *Webster*, 131 Mass. 454; *Attorney General* v. *Barnum*, 167 Mass. 477, 46 N. E. 1; *Opinion of the Justices*, 302 Mass. 605, 620, 621, 19 N. E. (2d) 807.

[16] Hart, *Tenure of Office Under the Constitution*, pp. 186, 301, 304; Hart, *The Bearing of Myers* v. *United States* upon the Independence of Federal Administrative Tribunals, 23 Am. Pol. Sci. Rev. 657, 665; Donovan and Irvine, *The President's Power to Remove Members of Administrative Agencies*, 21 Corn. L. Q. 215, 228; Corwin, *Tenure of Office and the Removal Power under the Constitution*, 27 Col. L. Rev. 353, 392, 397.

feasance in office. The basis for the decision was that the Federal Trade Commission "cannot in any proper sense be characterized as an arm or an eye of the executive. * * * the commission acts in part quasi-legislatively and in part quasi-judicially" (p. 628). The Court reaffirmed, however, the basic principle of the *Myers* case that with respect to an officer in the executive branch, the executive has the "exclusive and illimitable power of removal" (p. 627).[17]

The *Humphrey's* decision recognizes that quasi-legislative and quasi-judicial tribunals occupy a special position, and that limitations upon the unrestrained executive power of removal are justified to preserve the Commissioners' independence in the exercise of non-executive functions. Thus, when Congress creates an office with quasi-legislative or quasi-judicial functions, to the faithful performance of which impartiality and freedom from political control are obviously important, its constitutional authority extends to protecting such an official against control by the executive through unqualified exercise of the removal power. But the *Humphrey's* case nowhere suggests that any officer—even one exercising quasi-legislative or quasi-judicial power—may be directly removed by Congress itself.

[17] Counsel for the plaintiff in the *Humphrey's* case and Senator Pepper as *amicus curiae* in the *Myers* case conceded that the act of removal was an executive, not a legislative function (295 U. S. at 608, 609; 272 U. S. at 68).

In any event, the *Humphrey's* case clearly has no application here, since respondent Lovett's position as Executive Assistant to the Governor of the Virgin Islands was a purely executive office without quasi-legislative or quasi-judicial functions.[18] And even though respondents Watson and Dodd held positions in an agency whose functions included quasi-legislative and quasi-judicial matters,[19] they were staff members concerned with exclusively executive matters. Both were engaged in work for the Foreign Broadcast Intelligence Service, analyzing foreign broadcast propaganda (R. 24, 29). This work did not involve regulatory functions, but simply administra-

[18] The Governor of the Virgin Islands is vested with "The executive power of the Virgin Islands and of the municipalities thereof * * *" (Act of June 22, 1936, Sec. 20, 49 Stat. 1807, 1812; 48 U. S. C. 1405s). Respondent Lovett's official duties as the Governor's assistant had no relation either to the legislative branch of the government of the Virgin Islands (which is divided between Congress and municipal councils) or to the judicial branch of that government (which consists of a district court and inferior courts established by local law). Organic Act of June 22, 1936, 49 Stat. 1807, as amended, 48 U. S. C. 1405 et seq., secs. 5, 6, 7, 25, 26.

[19] The statutory functions of the Federal Communications Commission include making recommendations to Congress as to proposed legislation, fixing rates for interstate and foreign communication by wire or radio, granting monetary relief to persons damaged by carriers' violations of the Federal Communications Act, and granting and revoking licenses for radio transmission. Federal Communications Act of 1934, 48 Stat. 1064, 47 U. S. C. 151 et seq., secs. 205 (a), 209, 220 (j), 303, 307, 312.

tion and collaboration with executive agencies such as the Office of Facts and Figures, the Coordinator of Information, and the Coordinator of Inter-American Affairs. *Seventh Annual Report, Federal Communications Commission* (1941) pp. 1–6. Hence respondents Watson and Dodd were in substantially different positions from those held by the Commissioners of the Federal Communications Commission. They must be treated in the same manner as Dr. Lovett, who unquestionably held an office in an executive department; and the Humphrey's decision has no applicability to them.

It is clear therefore that both the *Myers* and the *Humphrey's* cases deny to the Congress any direct power of removal of inferior executive officers such as respondents. Both decisions thereby give full weight to the constitutional provisions vesting the executive power in the President and specifically granting to him the general appointive power, to which the removal power is normally an incident.

3. The Practice under the Constitution Negatives any Direct Removal Power in Congress

From the foundation of our Government both the Congress and the chief executive have, with rare exceptions, consistently recognized that the power to remove an executive official is in the executive and not in the legislative branch. At many periods in our history Congress and the

President have engaged in bitter controversies over the fitness of particular executive officers to hold office. Yet never heretofore, except in one instance only four years ago, has Congress resorted to the device embodied in Sec. 304. This uniform course of practice is highly persuasive evidence of the true construction of the constitutional provisions discussed above, particularly when it includes the practice followed by those Framers of the Constitution who afterward participated in the Government.[20]

In the First Congress in 1789, there arose in connection with the bill establisihng a Department of Foreign Affairs, the question whether Congress should recognize and declare that under the Constitution the President had the power to remove the Secretary of Foreign Affairs without the advice and consent of the Senate. Many of the leading figures of the Constitutional Convention were members of the First Congress. The debate on this issue was exhaustive and expressed all possible points of view. The bill as passed explicitly recognized the authority of the President to remove the Secretary of Foreign Affairs without the advice and consent of the Senate. This action was taken to be a definitive construction of the Constitution as vesting the removal power in the executive. 1 Annals of Congress 463, 464, 495, 496, 499, 581, 582; I Bancroft, *History of the*

[20] See *Myers* v. *United States*, 272 U. S. 52, 175.

Constitution of the United States, p. 192. As Mr. Madison observed: "The decision that is at this time made, will become the permanent exposition of the Constitution * * *" (1 Annals of Congress 496).

Because of the variety of views expressed in this historic debate, there is some difference of opinion as to the inferences to be drawn from the votes on the measure. Compare the majority and dissenting opinions in the *Myers* case, pp. 111–136, 193–199, 284, 285. But no one has contended that even those members of Congress who took the most extreme position in favor of Congressional control over the power of removal went beyond the proposition that Congress might impose conditions upon the executive's power to remove inferior officers. Cf. *United States* v. *Perkins,* 116 U. S. 483. It has never been suggested that any member of the First Congress considered that Congress could go beyond this, as it has attempted to do in the enactment of Section 304, and itself effect a legislative removal.

The legislative decision of 1789 was immediately accepted and acted upon as a binding construction of the Constitution (even though some felt that as an *a priori* proposition the Constitution was susceptible of a different construction). Thus, Chief Justice Marshall in his *Life of Washington,* first published in 1807, stated that "As the bill passed into a law, it has ever been considered as

a full expression of the sense of the legislature on this important part of the American constitution" (Vol. II (2d ed.), p. 162). Similarly, Chancellor Kent writing to Daniel Webster in 1830 observed that "it is too late to call the President's power in question, after a declaratory act of Congress and an acquiescense of half a century" (I *Private Correspondence of Daniel Webster* (1857 ed.), p. 487). And in his *Commentaries* Chancellor Kent concluded, "It may now be considered as firmly and definitely settled, and there is good sense and practical utility in the construction" (I Kent, *Commentaries,* Lecture 14, p. 310). Cf. II Story, *Commentaries on the Constitution,* secs. 1543, 1544; IV Webster, *Works,* p. 198.

A few days after enacting the bill establishing the Department of Foreign Affairs, the First Congress passed a statute which adapted the Northwest Ordinance of 1787 to the Constitution. The Northwest Ordinance had provided for the appointment and removal of executive territorial officers by the Congress under the Articles of Confederation. The amendatory act, however, expressly gave to the President the powers of removal from office which under the Northwest Ordinance were vested in the Congress. 1 Stat. 50, 53.

The only early statutes ever alleged to constitute Congressional removals from office are two so characterized by Mr. Justice McReynolds in his

dissenting opinion in the *Myers* case (pp. 186, 190, 214, 215)—the first general Tenure of Office Act of May 15, 1820 (3 Stat. 582), and the Act of July 2, 1836 (5 Stat. 80). We submit, however, that this view is erroneous. The Act of May 15, 1820, provided that certain named officials, among them district attorneys and collectors of the customs, should be appointed for a term of four years and provided that the terms of existing incumbents of those offices (who had been appointed without term to serve at will) should expire on specified dates. The provisions of this Act were not directed against any of the existing incumbents as such; their purpose was to adopt a policy of giving the specified offices a fixed term of four years. Unless a limitation had been fixed upon the terms of the incumbents then in office, they would have continued to serve for life, unless removed by the President and the policy of the Act would have been ineffective for an indefinite period.

The Act of July 2, 1836, authorized the President to appoint deputy postmasters for certain post offices and provided they should hold office for a term of four years unless sooner removed by the President. Contrary to the statement of Mr. Justice McReynolds, the Act was not applicable to deputy postmasters then in office and, of course, could not be said to have constituted a legislative removal of them. While the Act did pro-

vide that if any mail contractor entered into a combination to restrain bidding for mail contracts "he may be forthwith dismissed from the service of the Department, It expressly conferred this dismissal power upon the Postmaster General (5 Stat. 87). Congress thus recognized that the power of dismissal was in the executive branch, and merely prescribed a condition upon which the Postmaster General might dismiss certain officials.[21]

There have been several instances in which the Senate or members of Congress, entertaining opinions as to the fitness of particular persons to hold office, have attempted to influence the President with respect to their removal. The fact that no attempt was made to remove any of these officials by legislative action is persuasive of a belief in Congress that it lacked the power to do so. In 1794 a party caucus of Senate and House members unsuccessfully sought to persuade President Washington to recall Gouverneur Morris as Ambassador to France and to replace him by Aaron Burr. Haynes, *Senate of the United States,* pp. 725, 812. In 1835, upon Presi-

[21] Similarly, the Act of January 31, 1823 (3 Stat. 723), provided that officers failing to account for public funds should be dismissed by the President. This again recognized that while Congress might prescribe conditions upon which the power of removal should be exercised, the function of removal was executive not legislative.

dent Jackson's refusal to comply with a Senate resolution requesting his reasons for removing an officer, he categorically stated that "The President * * * possesses the exclusive power of removal" and that while he is liable to impeachment if "he abuses this power", "on no principle known to our institutions can he be required to account for the manner in which he discharges this portion of his public duties, save only in the mode and under the forms prescribed by the Constitution" (III Richardson, *Messages and Papers of the Presidents,* p. 133).

In the Act of July 17, 1862, Congress requested the President to discharge from the military service any officer for any cause which in his judgment rendered such officer unsuitable for public service (12 Stat. 594, 596). By this Act, Congress again recognized that the power of removal was in the President; the purpose of the Act was to stimulate by Congressional declaration during the crisis of the Civil War the exercise of the authority of the President. 15 Op. A. G. 421; *Blake* v. *United States,* 103 U. S. 227, 234. In 1862, a caucus of Republican Senators passed a resolution that the welfare of the country required the removal of Secretary of State Seward, and a committee of Senators urged his removal upon President Lincoln, stating that the emergency was serious enough to require their "friendly counsel."

President Lincoln declined their advice.[22] Haynes, *Senate of the United States*, pp. 812–815.

Accordingly, up to the period when intense differences of views over the reconstruction policy resulted in bitter political controversy between President Johnson and the Congress, climaxing the conflicts in our history between the executive and the legislative branches, both Congress and the Presidents had consistently recognized that under the Constitution the power of removal was vested solely in the executive.

As a part of the effort of Congress to impose its will upon President Johnson with respect to reconstruction policy, there was enacted a provision in the Act of March 2, 1867, 14 Stat. 485–487, to the effect that all orders relating to military operations by the President or the Secretary of War should be issued through the General of the Army, who should not be removed or relieved from command, except at his own request, without previous approval of the Senate. The Tenure of Office Act of March 2, 1867, 14 Stat. 430, was also enacted, providing that all officers appointed by and with the consent of the Senate should hold office until their successors should have been in like manner appointed and qualified and that certain heads of departments, including

[22] See also the account *infra*, pp. 41–42, of a proposed House resolution of 1867, that it was the sense of the House that the collector of the port of New York should be removed from office.

the Secretary of War, should hold office during the term of the President by whom appointed and one month thereafter subject to removal by consent of the Senate. As is well known, President Johnson vetoed the Tenure of Office Act (VI Richardson, *Messages and Papers of the Presidents*, p. 492), and upon its passage over his veto, refused to comply with it and removed Secretary of War Stanton, an action which brought about his impeachment and trial. See *Parsons* v. *United States*, 167 U. S. 324, 340.

The constitutionality of these statutes, enacted as they were in a passionate partisan conflict which is now generally recognized as a deplorable blot upon our history, was never judicially determined. But this Court clearly indicated in the *Myers* case (at p. 167) that it considered them unconstitutional in view of the settled constitutional construction, vesting the removal power in the executive. In any event, the controversy between President Johnson and Congress demonstrates that even during a period of extreme views, Congress did not assert for itself the power of removal of executive officers.[23]

[23] Immediately upon the inauguration of President Grant, Congress repealed in part the Tenure of Office Act, by the Act of April 5, 1869, 16 Stat. 6. In his first message to Congress, President Grant recommended the entire repeal of the Act on the ground that its provisions were an unconstitutional infringement of the Executive's power of removal. VII Richardson, *Messages and Papers of the Presidents*, p. 38. Finally, by the Act of March 3, 1887, 24 Stat. 500, the Act was repealed.

On March 21, 1867, the Committee on Public Expenditures of the House reported a resolution "that Henry A. Smythe should be immediately removed from the office of collector of the port of New York; and that the Clerk of the House cause a certified copy of this resolution to be laid before the President of the United States" (77 Cong. Globe, p. 255). This resolution did not purport to remove Mr. Smythe from his position; it went no further than a statement by the House that the Executive branch should remove him. Yet even this, the House believed, exceeded its powers (*id.* pp. 255, 256, 282–283, 335); and an amendment was offered, completely changing the resolution into one for impeachment. But this too was found objectionable, since no investigation had been made to determine whether there were grounds for impeachment. The resolution was therefore amended to refer the matter back to the Committee on Public Expenditures for an investigation and, if they deemed guilt established, to prepare articles of impeachment (*id.* pp. 284–285, 289–290). It does not appear that the Committee ever reported. See III Hinds' *Precedents of the House of Representatives* (1907) pp. 1006–1007.

In 1886 President Cleveland denied the right of the Senate to request his reasons for removing certain officials, stating that "the power to remove or suspend such officials is vested in the President

alone" and that "when the Constitution by express provisions superadded to [the Senate's] legislative duties the right to advise and consent to appointments to office and to sit as a court of impeachment, it conferred upon that body all the control and regulation of Executive action supposed to be necessary for the safety of the people" (VIII Richardson, *Messages and Papers of the Presidents,* p. 379).

In 1924, in connection with the Teapot Dome scandal, the Senate passed a resolution calling on the President to request the resignation of the Secretary of the Navy (65 Cong. Rec. 2245). Several Senators contended that the resolution was an unwarranted interference with the Executive (65 Cong. Rec. 1719, 1730, 1734, 1981–1982, 2072–2080, 2169), and President Coolidge declined to recognize the resolution, stating that "The dismissal of an officer of the Government, such as is involved in this case, other than by impeachment, is exclusively an Executive function. I regard this as a vital principle of our Government" (65 Cong. Rec. 2225).

From 1921 to 1932 Secretary of the Treasury Mellon was the target of many Senate resolutions intended to bring about his resignation (65 Cong. Rec. 4014, 5243; 69 Cong. Rec. 5054, 5145–5155; 71 Cong. Rec. 1007–1028). But his Senatorial opponents never considered that the device of legislative removal was open to them. When

during the same period, the Senate attempted to recall its confirmation of a Presidential nomination to the Federal Power Commission, President Hoover refused to recognize the validity of the recall, stating that he could not "admit the power in the Senate to encroach upon the Executive function by removal of a duly appointed executive officer under the guise of reconsideration of his nomination" (74 Cong. Rec. 1929; see *United States* v. *Smith*, 286 U. S. 6).[24]

The dissent of Mr. Justice Brandeis in the *Myers* case contains an exhaustive review of Federal statutes prescribing qualifications for appointment to particular inferior offices and qualifying the President's removal power (*Myers* case, pp. 262–282). As the majority pointed out (p. 170), the failure of the Presidents to veto many of these acts may perhaps be explained, not by Presidential acquiescence, but by the fact that the measures were riders to otherwise valuable legislation which could not be vetoed without serious injury to the public wel-

[24] A comprehensive study of Congressional investigative committees cites numerous instances in which such committees have uncovered maladministration or corruption on the part of executive officers and many cases where resolutions were introduced to force the hand of the President to remove the official concerned. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153. Not a single instance is cited of an attempt by Congress itself to remove the officer, whether by direct fiat or by withholding an appropriation for his salar

fare. And it is noteworthy that not a single one of the statutes cited went beyond the constitutional power of Congress, as established in *United States* v. *Perkins,* 116 U. S. 483, to limit and regulate the executive power of removal. No effort was made to assert a power of removal by the legislature itself.

The only statutes in which Congress has explicitly asserted a right itself to remove officials are two relatively recent ones establishing the General Accounting Office and the Tennessee Valley Authority. Under the Budget and Accounting Act, the Comptroller General and Assistant Comptroller General may be removed, not only by impeachment, but by joint resolution of Congress for certain specified causes. Act of June 10, 1921, 42 Stat. 20, 23–24, 31 U. S. C. 43.[25] This Act, however, is not a precedent for Congressional removal of executive officers, for the Comptroller General is not primarily a part of the executive branch, but is an agent of Congress whose function it is to check upon compliance with the laws by the executive branch of the Government. III Willoughby, *Constitutional Law of the United States* (2d ed.), p. 1526. The Comptroller Gen-

[25] In its original form the Budget and Accounting Act of 1921 provided for the removal of the Comptroller General by concurrent resolution and was vetoed by President Wilson solely because he regarded this provision as an unconstitutional limitation upon the Presidential power of removal. 59 Cong. Rec. 869.

eral, or his predecessors in the same type of office, have been regarded since the adoption of the Constitution as occupying a unique position. Act of September 2, 1789, 1 Stat. 65; Act of March 3, 1817, 3 Stat. 366; Act of July 31, 1894, 28 Stat. 162, 205.[26] The Act creating the General Accounting Office specifically prescribes that it "shall be independent of the executive departments" (42 Stat. 23, 31 U. S. C. 41). Cf. *Humphrey's Executor* v. *United States*, 295 U. S. 602.

The Tennessee Valley Authority Act, which authorizes presidential removal of directors who make appointments or promotions on the basis of a political test or qualification, contains a separate provision that any director "may be removed from office at any time by a concurrent resolution" of the Congress (48 Stat. 60, 63, 16 U. S. C. 831c(f), 831e). The origin of this provision is obscure, for it was not referred to in either the committee reports or the debates on the bill. See *Note*, 51 Harv. L. Rev. 1246; S. Rep. No. 23, 73d Cong., 1st sess.; H. Rep. No. 130, 73d Cong., 1st sess. The validity of the provision has been questioned (Corwin, *The President*, *supra*, p. 95).

[26] Madison recognized that the Comptroller's office exercised a peculiar blend of governmental powers and was therefore properly subject to greater control by the legislative branch. See 1 Annals of Congress 611–612, 614. See also 1 Op. A. G. 624, 629; VIII Hamilton, *Works* (1904 ed.), p. 548; Taft, *Our Chief Magistrate and His Powers* (1916), pp. 81, 125–126.

The only instance thus far of removal of a Tennessee Valley Authority director by the President has been on a ground other than that specified in the Act as a basis for Presidential removal. See *Morgan* v. *Tennessee Valley Authority*, 115 F. 2d 990 (C. C. A. 6), certiorari denied, 312 U. S. 701.[27]

In a few recent instances, members of Congress have advocated the device employed in Section 304, but have been unsuccessful. In 1925, when the House Appropriations Committee reported out the War Department Appropriation bill with amendments providing that no part of the appropriation which it contained should be paid to two named Army officers, the House recognized that these provisions were unconstitutional and voted down the amendments. 65 Cong. Rec. 4744, 5031–5036, 5041–5043. During Senate consideration of the 1940 Interior Department Appropriation bill, an amendment, barring use of any part of the appropriation to pay the salary of a named official, was likewise defeated. 84 Cong. Rec. 4308–4346. In the Department of the Interior Appropriation bill for 1942 (H. R. 4590, 77th Cong., 1st sess.), a provision against use of the appro-

[27] It has been suggested that the Tennessee Valley Authority is a legislative agency. Larson, *Removal Power of the President*, 16 Tenn. L. Rev. 259, 277. And see *Ashwander* v. *United States*, 297 U. S. 288, 326–332. Cf. the statement of Senator Norris that "The very theory of the Tennessee Valley Authority Act itself was to make the organization independent of any Department, independent of any President" (83 Cong. Rec. 3474).

priation to pay a named employee of that department was eliminated in the Senate. 87 Cong. Rec. 4677; H. Rep. No. 773, 77th Cong. 1st sess., p. 10. Again, in November, 1942, the House Committee on Agriculture reported out a bill to aid agriculture in Puerto Rico (H. R. 7505) with a clause that "any appropriation made pursuant to this Act shall be conditioned that the funds shall not become available at any time during the service of the present Governor of Puerto Rico."; but there was no debate on the bill and it died in that Congress (H. Rep. No. 2641, 77th Cong., 2d sess., p. 1). In the Independent Offices Appropriation Bill for 1943 (H. R. 6430, 77th Cong., 2d Sess.), the Senate eliminated a House provision that no part of the appropriation should be used to pay the compensation of respondent Watson. 88 Cong. Rec. 3997–4004; H. Rep. No. 2259, 77th Cong., 2d sess., p. 3.

The only instance prior to Section 304 in which legislation was enacted with a provision withholding the use of an appropriation to pay the salary of a named person was contained in the Emergency Relief Appropriation Act for 1942, 55 Stat. 396. Shortly thereafter, the House Appropriations Committee recognized the impropriety of this provision and attached a rider to the Third Supplemental Defense Appropriation bill for 1942 repealing it. H. R. 6159, 77th Cong., 1st sess. However, the Chair sustained a point of

order that the rider was legislation in an appropriation bill, and no opportunity was presented for a record vote on the repealer. 87 Cong. Rec. 9494.

The foregoing review of our constitutional practice establishes that, with minor exceptions, it has been consistently believed for over 150 years that the power to remove from office is vested in the executive alone; that in the case of inferior executive officers the Congressional control over removal is limited to restricting by legislation the executive's power of removal; and that Congress may not constitutionally remove such officials from office either by an act of removal or by the device of withholding the availability of appropriations to pay their salaries.

4. The Spending Power Does Not Embrace a Legislative Removal Power

It cannot validly be maintained that the constitutional power of Congress, "To lay and collect Taxes * * * to pay the Debts and provide for the common Defence and general Welfare of the United States" (Art. I, Sec. 8, cl. 1) embraces a power to remove officers of the executive branch. We recognize, of course, that the spending power extends beyond the powers elsewhere conferred by the Constitution, and that conditions may be included in legislation governing the expenditure of appropriated funds. But we contend that such

conditions may not be made the vehicle of overcoming limitations which are attached to Congressional power as a whole by other provisions of the Constitution. Such has been the clearly stated view both of this Court and of other courts which have considered the same problem under state constitutions.

The first case in which this Court had occasion clearly to state the scope of the spending power and the related power to tax was, of course, *United States* v. *Butler,* 297 U. S. 1. Both the majority and dissenting opinions set forth the broad range of the power to tax and spend and asserted that it has recognizable limits. 297 U. S. at 67, 87. The opinions differed as to the sweep of the economic powers of the Federal Government and of the spending power itself; but that the spending power may not be used to subvert the constitutional scheme of government was expressly recognized. Again in *Cincinnati Soap Co.* v. *United States,* 301 U. S. 308, 313, the Court, while sustaining a tax and an accompanying appropriation of the resulting funds as valid, and while asserting the broad discretion of Congress in respect to taxing and spending, recognized that "plain cases" of unconstitutionality may arise. In *Steward Machine Co.* v. *Davis,* 301 U. S. 548, and *Helvering* v. *Davis,* 301 U. S. 619, inquiry was made whether the purposes of the taxes there involved were within the power of Congress to promote the gen-

eral welfare, as of course they were. 301 U. S. at 586–593; 301 U. S. at 640–645. The opinion in the former case expressly recognized that a condition in a taxing statute "unrelated to the fiscal need subserved by the tax in its normal operation or to any other end legitimately national" would be invalid. 301 U. S. at 591.

Equally invalid, we submit, is an attempt in a taxing or appropriation act provision to disregard the Bill of Rights or to secure to the Congress a power which belongs to one of the other branches of the Government. Constitutional safeguards may not be so lightly set aside or the constitutional framework of the Government so readily altered. Thus an appropriation act provision may not invade the pardoning power of the President or the judicial function of deciding cases (*United States* v. *Klein,* 13 Wall. 128); it may not invade the realm of the executive authorities in administering the expenditure of funds (*People* v. *Tremaine,* 252 N. Y. 27); and it may not be employed as a means of exercising the appointing power normally lodged in the executive. *State ex rel. Worrell* v. *Carr,* 129 Ind. 44. Likewise improper is the attempted exercise of the removal power by the legislature through appropriation act provisions withholding money from named officials. *Reid* v. *Smoulter,* 128 Pa. St. 324, 335–336; *People ex rel. Burby* v. *Howland,* 155 N. Y. 270, 279.

The matter is clearly expressed in *State ex rel. Tolerton* v. *Gordon*, 236 Mo. 142, 169-170, as follows:

> * * * If in the discharge of a duty imposed both by the Constitution and by the law the executive has exercised his prerogative by appointing to the office of Game and Fish Commissioner a person who in his judgment is faithfully performing his official duty, is it within the power of the Legislature to review the action of the executive and paralyze it by providing in an appropriation act that such appointee shall not receive compensation for his services in such office, although any other person may? If so, then the Legislature may designate, in an appropriation act for the payment of salaries, those who shall and those who shall not be entitled to compensation thereunder, and thus hamper the executive, not only in the exercise of the appointing power, but also in carrying out the mandate of the organic law in taking care that the laws are faithfully executed. Under the authorities cited it is clear that such power has not been granted to the lawmaking branch of the government. The Legislature has the undoubted power to make or to refuse to make an appropriation authorized by the Constitution, and it has the power to create or abolish an office when unrestrained by constitutional limitations, but it has not the

> power to say who shall not be compensated out of an appropriation for the payment for official services rendered, nor to say indirectly who shall be appointed to or removed from the office thus created.

We think the views thus expressed with respect to limitations upon the taxing and spending power must prevail if constitutional government is to survive. Therefore if it is true, as we contend, that the power to remove Federal executive officers belongs to the President and may not be exercised by the Congress, it follows that an appropriation act provision which attempts to exercise that power is equally as invalid as a direct legislative decree of ouster. Section 304 of the Urgent Deficiency Appropriation Act of 1943 must therefore fall.

C. WHETHER RESPONDENTS ARE DEEMED "OFFICERS" OR "EMPLOYEES" IS IMMATERIAL HERE

As already noted, the Constitution permits the Congress to vest the appointment of "such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments" (Art. II, Sec. 2, cl. 2). Under this clause it has uniformly been held that persons appointed by the President, the Courts of Law, or the Heads of Departments authorized by law to make such appointments, are "officers" of the

United States.[28] Respondent Lovett, therefore, was undoubtedly an "officer", since appointment to his position as Executive Assistant to the Governor of the Virgin Islands was vested by Congress in the Secretary of the Interior (R. 20; 49 Stat. 1813, 48 U. S. C. 1405v).[29] And while respondents Watson and Dodd were appointed by

[28] *United States* v. *Germaine*, 99 U. S. 508; *United States* v. *Hartwell*, 6 Wall. 385, 393–394; *United States* v. *Mouat*, 124 U. S. 303, 307; *United States* v. *Smith*, 124 U. S. 525, 532; *McGrath* v. *United States*, 275 Fed. 294, 300 (C. C. A. 2) appeal dismissed, 260 U. S. 709; *Collins* v. *United States*, 14 C. Cls. 568, 574; *Hoeppel* v. *United States*, 85 F. 2d 237, 241 (App. D. C.); *Callahan* v. *United States*, 122 F. 2d 216, 218 (App. D. C.).

[29] Respondent Lovett was also an inferior officer when he served up to October 12, 1943, as Government Secretary of the Virgin Islands (R. 19), since that appointment, although made by the President, was not one requiring confirmation by the Senate (49 Stat. 1812, 48 U. S. C. 1405t). In any event, the nature of the office of Government Secretary of the Virgin Islands is immaterial, for, while respondent Lovett held that office when Section 304 became law on July 12, 1943, the Act by its terms did not become operative until November 15, 1943, at which time respondent Lovett was serving as Executive Assistant to the Governor of the Virgin Islands.

Dr. Lovett's positions had the usual indicia of office, including "tenure, duration, emolument and duties fixed by law." See *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 520. His appointments were with tenure and duration; as Government Secretary, at the pleasure of the President, since no other tenure was specified; and as Executive Assistant, under the provisions of Section 23 of the Organic Act of the Virgin Islands (Act of June 22, 1936, 49 Stat. 1813, 48 U. S. C. 1405v) that "officers appointed by the Secretary of the In-

the Federal Communications Commission,[30] not one of the traditional Government departments (see *United States* v. *Germaine*, 99 U. S. 508; *United States* v. *Mouat*, 124 U. S. 303, 307), we believe that they too should be held to have been appointed by the "Head of a Department" within the meaning of the Constitution.

The opinion in *United States* v. *Germaine*, *supra*, was rendered in 1878, before the now-familiar independent agencies had been established. It used the phrase "Heads of Departments" with reference to the seven executive departments then in existence, as distinguished from the chiefs of bureaus or offices within those branches, and this use of the term was repeated in *United States* v. *Mouat*, *supra*. But since the establishment of "independent" agencies such as the Federal Communications Commission, a different situation has been created. Whether such agencies are "Departments" in the sense of Art. II, Sec. 2, cl. 1 must be judged not by their formal designations but by their essential nature. For the purposes of the constitutional provision here

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terior shall hold office during his pleasure." Both had duties fixed by law; the Organic Act, in Section 21, specifies the duties of the Government Secretary (48 U. S. C. 1405t); and Order No. 1870, issued by the Secretary of the Interior, September 6, 1943, pursuant to Section 23 of the Act, specifies the duties of the Executive Assistant. In each case, he took an oath of office (R. 19).

[30] (R. 24, 29; see Sec. 4 (f) of the Federal Communications Act of 1934, 48 Stat. 1067, 47 U. S. C. 154 (f).

involved we know of no considerations that would warrant treatment of such agencies otherwise than as "Departments". For these reasons the Attorney General ruled in 1933 that the Civil Service Commission is a "Department" in the constitutional sense; that the three Commissioners constitute the "Head of a Department"; and that Congress could and did confer upon them as such the power to appoint a chief examiner. 37 Op. A. G. 227. And, in *Emergency Fleet Corp.* v. *Western Union Telegraph Co.*, 275 U. S. 415, 418, 426, this Court characterized the various independent establishments as "minor independent departments". See also 40 Op. A. G. No. 73. We believe therefore that the Federal Communications Commission is a "Department" for the purpose here involved[31] and that respondents Watson and Dodd, having been appointed by its "Head", were not subject to direct removal by Congress, any more than was respondent Lovett.[32]

In any event, whether respondents Dodd and Watson were "officers" is immaterial here, for nothing in the Constitution or its background suggests that the power of Congress to remove "employees" is any greater than its power to remove "officers." Certainly the general source of the

[31] A contrary conclusion was reached in *United States ex rel. Crow* v. *Mitchell*, 89 F. 2d 805, 808 (App. D. C.).

[32] The positions of respondents Watson and Dodd had the usual indicia of an "office". See *Metcalf & Eddy* v. *Mitchell*, *supra*, n. 29. Both positions had tenure: respondent Wat-

Congressional power to provide for all these government positions is the same—the "Necessary and Proper" clause (Art. I, Sec. 8, cl. 18), and it would seem to follow that Congress possesses no greater power of removal in the one case than in other.

There is, moreover, no sound basis for contending that the word "officer" was intended to cover only positions of importance, for in the debates in 1789 it was pointed out that "the inferior officers mentioned in the Constitution are clerks and other subordinate persons". 1 Annals of Congress 372. See Story, *Commentaries* (5th ed. 1891), Sec. 1536. If the Congress had a direct removal power limited to "offices", it apparently could not remove, because they are "officers", a postal clerk (*Foshay* v. *United States,* 54 F. 2d 668 (S. D. N. Y.)), a mail carrier (*Waddle* v. *Hughes,* 260 Ky. 269), a penal guard (*Baskins* v. *United States,* 32 F. Supp. 518 (E. D. S. C.)), an investigator of the Alcohol Tax

son had occupied his position since November 16, 1941 (R. 24); and respondent Dodd had been in his position since December 22, 1942 (R. 29). Both respondents held office at the will of the Commission, subject to applicable general laws. The positions clearly were not temporary in a sense which would prevent respondents from becoming officers. Cf. *United States* v. *Hartwell*, 6 Wall. 385; *United States* v. *Germaine*, 99 U. S. 508, 511; *Helvering* v. *Powers*, 293 U. S. 214, 224. In addition to tenure, the positions had emoluments, fixed by the authority of the Commission (R. 24, 30); respondents had fully specified duties and each took an oath of office (R. 24, 29).

Unit (*Brown* v. *Zerbst*, 99 F. 2d 745 (C. C. A. 5)), or an employee of the customs service (*Callahan* v. *United States*, 122 F. 2d 216 (App. D. C.). Such a strange result cannot be accepted as a proper construction of the Constitution. The only sensible conclusion is that no special removal power exists in Congress over "employees" as distinguished from "officers".

II. SECTION 304 OF THE URGENT DEFICIENCY APPROPRIATION ACT, 1943, IS UNCONSTITUTIONAL AS A BILL OF ATTAINDER

The President's message setting forth his objections to Section 304 (*supra*, n. 3) correctly characterized it as a bill of attainder. The permanent legislative disbarment of respondents by name from any future gainful Government employment falls plainly within the constitutional prohibition against bills of attainder.

Art. I, Sec. 9, cl. 3 of the Constitution provides that "No Bill of Attainder or ex post facto Law shall be passed."[33] The reasons for this flat prohibition lie in the evils of the English attainder practice with which the members of the Constitutional Convention were well acquainted. *Calder* v. *Bull*, 3 Dall. 386, 389.

A. BACKGROUND OF THE PROHIBITION AGAINST BILLS OF ATTAINDER

Attainder is a term derived from the English

[33] Art. I, Sec. 10, cl. 1 imposes the same prohibition upon the States.

common law and refers to the staining or blackening of the name and character of the person to whom it attaches. Upon sentence of death or outlawry, a person was attainted; the law set a mark of infamy upon him and withdrew from him all civil rights so that "He is no longer of any credit or reputation; he cannot be a witness in any court; neither is he capable of performing the functions of another man; for, by an anticipation of his punishment, he is already dead in law." IV Blackstone, *Commentaries*, pp. 380, 386, 387. "Attainder, in a strict sense, means an extinction of civil and political rights and capacities." Cooley, *Constitutional Limitations* (8th ed.), p. 536.

Attainder also involved forfeiture and corruption of blood so that one attainted could not retain or inherit or transmit land or other hereditaments. IV Blackstone, *Commentaries*, p. 388. However, at the time of the adoption of the American Constitution, forfeiture and corruption of blood were ceasing to be consequences of an attainder, which was then coming to involve predominantly civil and political rather than property disqualifications and disabilities. Stat. 5 Eliz., c. 1, c. 11; 18 Eliz., c. 1; 8 & 9 Wm. III., c. 26; 15 Geo. II, c. 28. As early as 1708 Parliament had provided for the practical abolition of corruption of blood for treason (Stat. 7 Anne, c. 21), although the operation of this statute was

subsequently postponed (Stat. 17 Geo. II, c. 39).[34] The elimination of corruption of blood and forfeiture as a consequence of attainder is reflected in Art. III, Sec. 3, cl. 2, of the Constitution, which provides that "The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."

Disqualification to hold public office was also one of the consequences of attainder. *State* v. *Hastings,* 37 Neb. 96, 119, 55 N. W. 774, 781. This is the punishment which the Constitution provides for impeachment (Art. II, Sec. 4) and is commonly prescribed by state constitutions as a consequence of conviction of certain crimes. Mechem, *Public Offices and Officers,* secs. 77–80.

Prior to our Constitution there were many instances in English history of bills of attainder and bills of pains and penalties (the former prescribing punishment of death and the latter imposing a lesser penalty. *Cummings* v. *Missouri,* 4 Wall. 277, 323; *Calder* v. *Bull,* 3 Dall. 386, 389;

[34] The statute of 7 Anne, c. 21, was repealed by Stat. 39 Geo. III, c. 93, but this repealer was enacted in 1798, after the adoption of our Constitution. Corruption of blood was abolished in all cases except high treason and murder by Stat. 54 Geo. III, c. 145. Finally, in 1870 the enactment of Stat. 33 & 34 Vict., c. 23, abolished attainder, corruption of blood and forfeiture upon judgment of treason or felony (except forfeiture consequent upon outlawry) but retained disqualification from holding public office.

Cooley, *Constitutional Limitations* (8th ed.), p. 538). In enacting these bills, Parliament assumed the judicial function of imposing punishment for offenses, in some instances for acts which were not crimes when committed, without regard to the rules of evidence and without regard to the punishment provided by law for the offense involved. No trial was necessary and no opportunity of defense had to be afforded the accused. *Calder* v. *Bull,* 3 Dall. 386, 389; Pomeroy, *Constitutional Law,* sec. 503. A bill of attainder was properly regarded as far more reprehensible than attainder for judicial conviction of crime because it punished the victim and blackened his name and character without any of the safeguards of a fair trial afforded in judicial proceedings.

Usually bills of attainder were enacted by Parliament in times of rebellion or great political crisis, when aroused passions overrode considerations of fairness and justice. As Mr. Justice Story observed:

> * * * In such cases, the legislature asumes judicial magistracy, pronouncing upon the guilt of the party without any of the common forms and guards of trial, and satisfying itself with proofs, when such proofs are within its reach, whether they are conformable to the rules of evidence or not. In short, in all such cases, the legislature exercises the highest power of sover-

> eignty, and what may be properly deemed an irresponsible despotic discretion, being governed solely by what it deems political necessity or expediency, and too often under the influence of unreasonable fears or unfounded suspicions. * * * The punishment has often been inflicted without calling upon the party accused to answer, or without even the formality of proof; and sometimes, because the law, in its ordinary course of proceedings, would acquit the offender." [II Story, *Commentaries on the Constitution* (5th ed.), Sec. 1344][35]

In prohibiting bills of attainder the members of the Constitutional Convention also had before them the several statutes enacted by the States during the Revolution, attainting loyalists for treason. Thus a Pennsylvania statute of 1778 described certain named persons as traitors and

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[35] An example of a bill of attainder enacted by Parliament prior to the adoption of our Constitution is "An act to inflict pains and penalties on Francis, Lord Bishop of Rochester" (Stat. 9 Geo. I, c. 17; 16 State Trials 323). The Act recited that the Bishop of Rochester was party to a conspiracy in 1721 to raise an insurrection against the Crown and to place a "popish pretender" on the throne, and provided that he should be deprived of all his offices and benefices ecclesiastical, should thenceforth be disabled and rendered incapable of taking or holding any office, benefice or employment within the realm or any dominion, of exercising any office or authority, ecclesiastical or spiritual, and should suffer perpetual exile and be forever banished from the realm and the dominions. For other examples, see the bills attainting the Earl of Clarendon (6 State Trials 318, 391) and the Earl of Strafford (3 State Trials 1382, 1518).

provided that if they should not submit themselves to a Pennsylvania court for trial before a specified date, they should be convicted and attainted of high treason (Pa. Laws 1778, c. 49; 1 Pa. Laws (Dall.), c. 784). Other Revolutionary statutes prescribed attainder for treason and imposed as a punishment disqualification from holding public office.[36] It has been generally recognized that these Revolutionary bills of attainder were within the Constitutional prohibition. *Cooper* v. *Telfair*, 4 Dall. 14, 19; Cooley, *Constitutional Limitations* (8th ed.), p. 539.

B. THE DECISIONS OF THIS COURT

Cummings v. *Missouri*, 4 Wall. 277, and *Ex parte Garland*, 4 Wall. 333, are the leading authorities on what constitutes a bill of attainder within the constitutional prohibition. The *Cummings* case involved a provision of the Missouri Constitution of 1865 to the effect that any person who had engaged in hostility against or who had been disloyal to the United States or had ever

[36] See 1 Laws N. Y. 772, 7th Sess. (1784), c. 66; Georgia Acts of March 1, 1778, and May 4, 1782, Vol. 1, Revolutionary Records of Ga., pp. 326, 373; N. H. Act of November 28, 1778, N. H. Perpetual Laws (1789), p. 85; 1 Laws N. Y. 173, 3d sess. (1779) c. 25; 8 R. I. Colonial Records 609; *Cooper* v. *Telfair*, 4 Dall 14; *Lessee of Hylton* v. *Brown*, 1 Wash. C. C. 298, 307; *Lessee of Delancey* v. *McKeen*, 1 Wash. C. C. 354; *Thompson* v. *Carr*, 5 N. H. 511; *Sleght* v. *Kane*, 2 Johns. Cas. (N. Y.) 236; Belnap, *History of New Hampshire*, ch. 26; II Ramsay, *History of South Carolina*, p. 351; II Arnold, *History of Rhode Island*, pp. 360, 449.

been connected with any organization inimical to the Government of the United States should be disqualified from holding any public office or from acting as a teacher; and that no person should continue to hold public office or practice as an attorney or clergyman unless he took a prescribed oath that he had not engaged in hostility against or been disloyal to the United States. Cummings was a Catholic priest who was convicted by the Missouri court of preaching without having taken the prescribed oath. The *Garland* case involved the constitutionality of Federal statutes which required an individual as a condition of entrance upon the duties of any public office or practice as an attorney in the Federal courts, to swear that he had not engaged in hostility against the United States or accepted office under any authority hostile to the United States (12 Stat. 502; 13 Stat. 424). Garland took part in the rebellion and was a member of the Confederate Congress. He applied to the Supreme Court for permission to continue to practice law without taking the oath.

In both cases the provision in question was held to be unconstitutional as a bill of attainder. This Court recognized that a statute which merely prescribes qualifications for public office or for practicing a profession is constitutional, but held that the legislature cannot, in the guise of prescribing a qualification for office, in effect impose a punishment for an offense which was not pun-

ishable when it was committed; and that the statutes involved did, in prohibiting persons within their scope from holding public office or practicing a profession, in effect punish them for conduct not so punishable when committed. The Court held that disqualification from public office was a form of punishment under the circumstances involved. In the *Cummings* case this Court said (pp. 319–322, 325):

> * * * But it by no means follows that, under the form of creating a qualification or attaching a condition, the States can in effect inflict a punishment for a past act which was not punishable at the time it was committed. * * *
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> * * * The oath could not, therefore, have been required as a means of ascertaining whether parties were qualified or not for their respective callings or the trusts with which they were charged. It was required in order to reach the person, not the calling. It was exacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment, and that for many of them there was no way to inflict punishment except by depriving the parties, who had committed them, of some of the rights and privileges of the citizen.

> * * * The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact. Disqualification from office may be punishment, as in cases of conviction upon impeachment. * * *
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> * * * * * *
>
> The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined.

See pp. 377, 379, 380 of the *Garland* case for similar statements. The *Cummings* and *Garland* cases were reaffirmed in *Pierce* v. *Carskadon,* 16 Wall. 234, 239.

Under the doctrine of these cases, Section 304 is clearly unconstitutional as a bill of attainder, for its actual purpose and effect are not to prescribe qualifications for public office, but to punish respondents for their past views and associations. Removal from and disqualification to hold office—the effect of Section 304 upon respondents—is a

well-recognized form of punishment." *Ex parte Curtis,* 106 U. S. 371, 374; *Mackin* v. *United States,* 117 U. S. 348, 352; *Barker* v. *People,* 3 Cowen (N. Y.) 686; *Huber* v. *Reily,* 53 Pa. St. 112, 116; contra, *Gray* v. *McLendon,* 134 Ga. 224, 253, 67 S. E. 859, 872. Disqualification to hold office affixes to the party "an indelible disgrace" and makes the offense for which such punishment is provided infamous. *United States* v. *Waddell,* 112 U. S. 76, 82; *Ex parte Wilson,* 114 U. S. 417, 426; III Willoughby, *Constitutional Law of the United States* (2d ed.), sec. 692. Indeed, one of the punishments for treason, the highest crime of all, is removal from and disqualification to hold office (Const., Art. II, Sec. 4; 35 Stat. 1088, 18 U. S. C. 2).[38]

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[37] Of course, Congress has the right to prescribe any reasonable standard of fitness to hold public office, even though this operates to disqualify an incumbent who is unable to meet the prescribed qualifications. *Heim* v. *McCall,* 239 U. S. 175; *Crane* v. *New York,* 239 U. S. 195; *Hawker* v. *New York,* 170 U. S. 189; *Dent* v. *West Virginia,* 129 U. S. 114; see also *Ex parte Wall,* 107 U. S. 265; *Ex parte Curtis,* 106 U. S. 371. The qualifications required must, however, be objective, or general, and not personal in nature.

[38] Section 3 of the Fourteenth Amendment disqualifies from holding public office anyone who, having taken an oath as a state or Federal officer to support the Constitution, engages in insurrection or rebellion. By the Act of March 3, 1865 (13 Stat. 487, 490), deserters who failed to return to their regiments were disfranchised and disqualified from holding public office. State constitutions and statutes commonly impose disqualification from public office as punishment for crime: See, *e. g.*, Conn. Const., Art. VI, secs. 3, 4;

The fact that Section 304 does not in terms purport to impose punishment on respondents is not decisive; its constitutionality is to be tested by its actual effect upon respondents. As this Court observed in the *Cummings* case, *supra*, "The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding." (4 Wall. at p. 325.)

The disqualification imposed upon respondents by Section 304 extends throughout their lives.[39] It

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Del. Const., Art. II, sec. 21; Ga. Const., Art. II, sec. IV; Ky. Const., sec. 150; Neb. Const., Art. XV, sec 2; Kan. Gen. Stat. Ann. (1935), sec. 21-121; Mo. Rev. Stat. Ann. (1939), sec. 4341; Neb. Rev. Stat. (1943), secs. 28-811. See also Mechem, *Public Offices and Officers*, secs. 77-80; Stimson, *American Statute Law*, sec. 223.

[39] The "opinion of the court" below (at R. 36-37) characterizes as "irrelevant" the provision of Section 304 which forbids payment from other appropriations than those made in the Act itself of compensation for services rendered by respondents to "any department, agency, or instrumentality of the United States". We believe that the court's view is not tenable. The barrier of clause (2) of the Section (*supra*, p. 4) went into effect at the same time as the provision in clause (1) forbidding payment to respondents from the appropriation made in the Act. The two provisions are linked together in purpose and effect. If clause (2) cannot be

will continue to bar them from Federal service even though they may wholly alter the political views and associations attributed to them by the legislative sponsors of Section 304. In this respect Section 304 goes beyond even the test oaths formerly used in England and France, which were always limited to an affirmation of present belief or present disposition toward the government and were never exacted with reference to particular instances of past misconduct. *Cummings* case, p. 318. It is evident, moreover, that this legislative proscription impairs the ability of respondents to obtain employment even outside the Government, because of the importance which attaches to Congressional action, whatever its basis.

Section 304 bears no resemblance to a measure fixing qualifications for Federal office. The Section makes no reference to offices nor does it prescribe any qualifications for holding office. Section 304 strikes only at these three persons, and by name; it does not bar from office any other citizen even though he may entertain views or engage in activities far more "subversive" than those attributed to respondents by the special subcommittee. Section 304 was enacted "in order to reach the person, not the calling." *Cummings*

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challenged now, it could be litigated in the future only if some agency of the Government should see fit to employ one of the respondents in the teeth of the Section, and an action similar to this were then brought.

case, p. 320. Furthermore, while a statute fixing qualifications to hold office would be concerned with the qualifications of the applicant or incumbent at the time of taking or holding office, Section 304 imposes a permanent disqualification because of past facts, irrespective of qualifications which they may possess in the future.

That Section 304 was not designed to fix qualifications for government employment is strikingly brought out by contrasting it with Section 301 of the same Act. Section 301 provides that no part of any appropriation contained in the Act shall be used to pay the salary of any person "who advocates, or who is a member of an organization that advocates, the overthrow of the Government of the United States by force and violence" and provides that any such person who accepts salary paid from any appropriation made by the Act shall be guilty of a felony (57 Stat. 449, 450). That Section, unlike Section 304, operates equally upon all persons and expresses the judgment of Congress that anyone who advocates the overthrow of the Government by force or violence is not qualified for government service.

Section 304 is a bill of attainder even if construed as expressing merely the judgment of Congress that respondents are unfit to hold Federal employment. For, a characteristic of bills of attainder is that they involve the exercise of judicial functions by the legislature. "In these cases the

legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the text-books, judicial magistry." *Cummings* case, p. 323. Section 304 squarely falls within this test. For Congress to decide, as it has done here, that three particular persons have expressed "subversive" views or have been associated with "subversive" organizations, and then to deal with them in a particular manner, is an exercise of the judicial function. Cooley, *Constitutional Limitations* (8th ed.), p. 185; *Prentis* v. *Atlantic Coast Line Company,* 211 U. S. 210, 226; *Reynolds* v. *McArthur,* 2 Pet. 417, 435; *Newland* v. *Marsh,* 19 Ill. 376, 383. This was recognized by Representative Cannon, Chairman of the Committee on Appropriations, when he stated that the function of the special subcommittee was "to authoritatively adjudicate all charges of disloyalty" of Federal employees (89 Cong. Rec. 711). "That is not legislation which adjudicates in a particular case, prescribes the rule contrary to the general law, and orders it to be enforced" (*Ervine's Appeal,* 16 Pa. St. 256, 266).

Section 304 reflects disregard of accepted safeguards of fairness and justice embodied in judicial trials, such as gave rise to the historic objections to bills of attainder. Thus, respondents were not given a public trial, the hearings before the subcommittee being held in executive session

(R. 21, 26, 30–31). Cf. *Gaines* v. *Washington*, 277 U. S. 81; *Davis* v. *United States*, 247 Fed. 394 (C. C. A. 8). Respondent Dodd was denied the right "to be informed of the nature and cause of the accusation" prior to his appearance before the subcommittee (R. 30). Cf. *United States* v. *Cruikshank*, 92 U. S. 542, 558, 559; *United States* v. *L. Cohen Grocery Company*, 255 U. S. 81. No witnesses testified at the hearings before the subcommittee, and the information considered by the subcommittee (taken from prior investigations by the Federal Bureau of Investigation, the House Committee on Un-American Activities, and others) was not shown to respondents (R. 21, 27, 30–31). Cf. *Motes* v. *United States*, 178 U. S. 458, 467–471; *Kirby* v. *United States*, 174 U. S. 47, 55–61. Respondents were denied the assistance of counsel, who were not permitted to attend the subcommittee hearings even as observers (R. 21, 27, 30–31). Cf. *Glasser* v. *United States*, 315 U. S. 60, 76; *Johnson* v. *Zerbst*, 304 U. S. 458. Respondents were not afforded the opportunity to produce witnesses in their own behalf or to have the compulsory process of the subcommittee for obtaining witnesses (R. 21, 27, 31). Cf. *United States* v. *Cooper*, 4 Dall. 341; *Casebeer* v. *Hudspeth*, 121 F. 2d 914 (C. C. A. 10).

The fact that Section 304 does not charge respondents with having committed any crime or purport to punish them for having committed

any legal offense does not make it any the less a bill of attainder. One of the features of certain bills of attainder was that they imposed penalties upon victims who had not committed any crime. See Cooley, *Constitutional Limitations* (8th ed.), p. 537. See also Macaulay, *History of England*, c. 12. The statutes invalidated in the *Cummings* and *Garland* cases did not purport to impose punishment for crimes, but did in effect impose punishment for certain acts which were not punishable when committed. *Cummings* case, pp. 327, 328; *Garland* case, p. 377.

In our judgment, under the foregoing authorities, Section 304 is unconstitutional as a bill of attainder.

CONCLUSION

For the foregoing reasons, we submit that Section 304 is unconstitutional and that the judgments below should be affirmed.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.
JOHN F. SONNETT,
Assistant Attorney General.
RALPH F. FUCHS,
DAVID L. KREEGER,
Special Assistants to the Attorney General.
JOSEPH B. GOLDMAN,
Attorney.

APRIL, 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946

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Nos. 809-811

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

UNITED STATES,

Petitioner,

vs.

ROBERT MORSS LOVETT

UNITED STATES,

Petitioner,

vs.

GOODWIN B. WATSON

UNITED STATES,

Petitioner,

vs.

WILLIAM E. DODD, JR.

MEMORANDUM FOR THE RESPONDENTS

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 809

UNITED STATES,

Petitioner,

vs.

ROBERT MORSS LOVETT

No. 810

UNITED STATES,

Petitioner,

vs.

GOODWIN B. WATSON

No. 811

UNITED STATES,

Petitioner,

vs.

WILLIAM E. DODD, JR.

MEMORANDUM FOR THE RESPONDENTS

Respondents do not oppose the granting of writs of certiorari in these cases. The constitutional issues involved are of the highest importance to the Government

of the United States, as stated in the Petition. In addition, they are of the highest importance to the respondents who, by Section 304, were permanently disqualified from gainful Government employment—a legislative punishment equal in its severity to the extreme punishment for conviction upon impeachment permitted by the Constitution (Article I, Section 3, clause 7). A majority of the Court of Claims has now found Section 304 to be unconstitutional. Notwithstanding that fact, the interests on both sides warrant review and final determination by this Court.

We fully agree with the statement in the Petition that a decision on the constitutional issue is necessary to determine these cases. We so argued in the Court of Claims, upon essentially the same bases as those stated by the Solicitor General (pp. 8-15). The cases squarely present the single issue—is Section 304 unconstitutional and void, or is it valid—and upon the determination of that question depends the rights of respondents to judgments for the amount of their unpaid salaries.

Respectfully submitted,

EDWARD B. BURLING,
CHARLES A. HORSKY,
AMY RUTH MAHIN,

March 1946.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR RESPONDENTS

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	2
Statement	3
a. The Respondents	3
Robert Morss Lovett	3
Goodwin B. Watson	5
William E. Dodd, Jr	6
b. The Statute	7
The origin and nature of the dispute	7
The respondents' connection with the dispute	11
The proceedings against these respondents in the House	13
The reports of the Kerr Committee	15
Legislative action on Section 304	20
c. The Present Position of the Respondents	24
d. The Decision Below	24
Summary of Argument	25
Argument	29
I. The sole issue in the instant case is the constitutional validity of Section 304	30
A. The purpose of Section 304 and its necessary effect, if valid, were to remove respondents from office	31
1. The language of Section 304	31
2. The legislative history of Section 304	32
3. The necessary effect of Section 304	35
B. If Section 304 is valid it destroyed any obligation to pay respondents compensation after November 15, 1943, even if it did not operate to remove them from office	36

Page

II. Section 304 is unconstitutional as an improper interference with the executive department 39

A. Congress has not been granted a power directly to remove the individual incumbents of Government positions except by impeachment and except as to positions in the legislative branch 42

1. The separation of powers principle condemns any interference by one department with either of the others except to the extent specifically authorized by the Constitution 44

2. The language of the Constitution clearly negatives any direct congressional power of removal 46

a. The impeachment provisions, which are an express grant to Congress of a direct removal power, negative by their presence any other or different power of direct removal 48

b. The specific grant to the executive of the power to appoint is itself equivalent to a a grant of the power to remove 50

c. The nature of the grant of "the executive power" indicates that the power of removal was granted to the executive branch 58

d. The congressional power to "vest" the power of appointment of certain officers cannot be construed as a grant of a removal power 62

e. The "necessary and proper" clause cannot be construed as a grant of a removal power 65

3. The practice for over 150 years under the Constitution confirms the fact that Congress was not granted any general direct removal power 68

4. Congress does not possess even a restricted power of direct removal which would enable it to remove these respondents 78

Page

a. Congress possesses no power directly to remove "employees" as distinguished from "officers" 78

b. Respondents, in any event, are not "employees" 82

c. The nature of the Federal Communications Commission does not afford Congress any power to remove its personnel 86

B. Congress may not exercise a power of removal otherwise denied it by a misuse of the appropriating power 90

1. The power of Congress to appropriate, like all other of its powers, is subject to constitutional limitations 90

2. Section 304 is an unconstitutional use of the appropriating power 99

3. The history of similar riders in Congress also condemns Section 304 104

4. The conditional nature of Section 304 does not change the result 109

III. Section 304 is unconstitutional as a bill of attainder 112

A. The constitutional provision involved 112

B. Section 304 is a bill of attainder, as that term has been defined and applied by the Court 116

1. The substance, not the form, of the statute, controls 118

2. Bills of attainder are characterized by their application to named or easily ascertainable individuals 121

3. Bills of attainder are "legislative acts which inflict punishment * * *" 124

4. Bills of attainder are legislative punishments "* * * without judicial trial" 128

C. The history of similar riders in Congress condemns Section 304 as a bill of attainder 135

Page

IV. Section 304 is unconstitutional because it denies respondents due process of law 138

A. The discrimination apparent on the face of Section 304 renders it void under the Fifth Amendment 139

B. The procedure by which respondents were convicted also violates the Fifth Amendment 142

Conclusion 151

Appendix ..... i-iii

CITATIONS

Cases:

Almy v. *California*, 24 How. 169 92
Ames v. *Kansas*, 111 U. S. 449 69
Barker v. *People*, 3 Cowen 686 (N. Y.), *affirming* 20 Johns. 457 126
Baskins v. *United States*, 32 F. Supp. 518 (E.D.S.Car.) 82
Belknap v. *United States*, 150 U. S. 588 37
Blake v. *United States*, 103 U. S. 227 67
Brown v. *Zerbst*, 99 F. (2d) 745 (C. C. A. 5th) 82
Burgess v. *Salmon*, 97 U. S. 381 129
Burnap v. *United States*, 252 U. S. 512 37
Butler v. *Pennsylvania*, 10 How. 402 67
Calder v. *Bull*, 3 Dall. 386 ..... 115 *et seq.*
Callahan v. *United States*, 122 F. (2d) 216 (App. D. C.) 81, 82
Carr v. *Gordon*, 82 Fed. 373 (C. C. N. D. Ill.) 67
Carver v. *Astor*, 4 Pet. 1 114
Cases v. *United States*, 131 F. (2d) 916 (C. C. A. 1st) 122
Cases of the Judges of the Court of Appeals, 4 Call 135 (Va.) 42
Charles C. Steward Machine Co. v. *Davis*, 301 U. S. 548 90
Charles J. Off & Co. v. *Morehead*, 235 Ill. 40, 85 N. E. 264 141
Child Labor Tax Case, 259 U. S. 20 93
Cincinnati Soap Co. v. *United States*, 301 U. S. 308 95
Cohens v. *Virginia*, 6 Wheat. 264 69
Cooley v. *Board of Port Wardens*, 12 How. 299 69
Cooper v. *Telfair*, 4 Dall. 14 114

Page

Costello v. *United States*, 51 C. Cl. 257 57
Cotten v. *Ellis*, 52 N. E. 545 42
Crenshaw v. *United States*, 134 U. S. 99 66
Cummings v. *Missouri*, 4 Wall. 277 ..... 28, 112-135 *passim*
Davis v. *United States*, 247 Fed. 394 (C. C. A. 8th) ... 146
Dent v. *West Virginia*, 129 U. S. 114 122
Dorsey, In the Matter of, 7 Porter 293 (Ala.) 117, 126
Drehman v. *Stifle*, 8 Wall. 595 117
Duncan v. *Kahanamoku*, Nos. 14, 15, October term, 1945 ..... 149, 150
Dunwoody v. *United States*, 143 U. S. 578 31
Eaves, In re, 30 Fed. 21 (C. C. W. D. N. Car.) 57
Emergency Fleet Corp. v. *Western Union Telegraph Co.*, 275 U. S. 415 84
Evans v. *Gore*, 253 U. S. 245 100
Fairbank v. *United States*, 181 U. S. 283 ..... 69, 92
Fidelity & Deposit Co. v. *Tafoya*, 270 U. S. 426 95
Fletcher v. *Peck*, 6 Cranch 87 ..... 116, 118, 135
Foshay v. *United States*, 54 F. (2d) 668 (S. D. N. Y.) ... 82
Frothingham v. *Mellon*, 262 U. S. 447 96
G. & D. Taylor & Co. v. *Place*, 4 R. I. 324 129
Gaines v. *Buford*, 1 Dana 481 (Ky.) 117, 128
Gaines v. *Washington*, 277 U. S. 81 146
Garland, Ex parte, 4 Wall. 333 ..... 28, 112-135 *passim*
Gibbons v. *Ogden*, 9 Wheat. 1 94
Glasser v. *United States*, 315 U. S. 60 147
Glaves v. *United States*, 182 U. S. 595 38
Grosjean v. *American Press Co.*, 297 U. S. 233 94
Grossman, Ex parte, 267 U. S. 87 ..... 59, 69
Hawker v. *New York*, 170 U. S. 189 122
Helvering v. *Davis*, 301 U. S. 619 90
Helvering v. *Powers*, 293 U. S. 214 85
Hendee v. *United States*, 22 C. Cls. 134 81
Henfield, Matter of, 13 Pet. 230 ..... 57, 58, 60
Hill v. *Wallace*, 259 U. S. 44 93
Hirabayashi v. *United States*, 320 U. S. 81 139
Hoeppel v. *United States*, 85 F. (2d) 237 (App. D. C.) 81
Howard v. *United States*, 22 C. Cl. 305 57
Humphrey's Executor v. *United States*, 295 U. S. 602 ..... 26, 45-112 *passim*
Hurtado v. *California*, 110 U. S. 516 ..... 28, 139
Inglis v. *Sailors' Snug Harbor*, 3 Pet. 99 114

Page

Interstate Commerce Commission v. *Louisville & Nashville R. R.*, 227 U. S. 88 148
Jackson v. *Sands*, 2 Johns. 267 (N. Y.) 114, 117
James's Claim, 1 Dall. 47 (Pa. Sup. Ct.) 114
Johnson v. *Zerbst*, 304 U. S. 458 147
Keim v. *United States*, 177 U. S. 290 37
Kendall v. *United States*, 12 Pet. 524 44
Kilbourn v. *Thompson*, 103 U. S. 168 46
Kline v. *Burke Construction Co.*, 260 U. S. 226 63
Knowlton v. *Moore*, 178 U. S. 41 69
Lamar v. *United States*, 241 U. S. 103 81
Lapa, The, 114 U. S. 411 69
Linder v. *United States*, 268 U. S. 5 ..... 91, 93
Lipke v. *Lederer*, 259 U. S. 557 146
Lynch v. *United States*, 292 U. S. 571 37
McCray v. *United States*, 195 U. S. 27 93
McCulloch v. *Maryland*, 4 Wheat. 316 91-92
McFarland v. *American Sugar Company*, 241 U. S. 79 ..... 120, 121, 141
McGrath v. *United States*, 275 Fed. 294 (C. C. A. 2d) *appeal dismissed*, 260 U. S. 709 81
McPherson v. *Blacker*, 146 U. S. 4 69
Magnano Co. v. *Hamilton*, 292 U. S. 40 93
Markham v. *Cabell*, No. 76, decided December 10, 1945 31
Martin v. *Hunter's Lessee*, 1 Wheat. 304 69
Martin v. *Snowdon*, 18 Gratt. 100 (Va.) 117
Massachusetts v. *Mellon*, 262 U. S. 447 96
Meriwether v. *Garrett*, 102 U. S. 472 45
Merrill v. *Sherburne*, 1 N. H. 199 129
Metcalf & Eddy v. *Mitchell*, 269 U. S. 514 ..... 83, 85
Metropolitan Trust Co. v. *Jones*, 384 Ill. 248, 51 N. E. (2d) 256 141
Minnesota Rate Cases, The, 230 U. S. 352 93
Minski v. *United States*, 131 F. (2d) 614 (C. C. A. 6th) *aff'd* 319 U. S. 463 140
Morgan v. *Tennessee Valley Authority*, 115 F. (2d) 990 (C. C. A. 6th) *certiorari denied* 312 U. S. 701 77
Morgan v. *United States*, 298 U. S. 468 148
Morgan v. *United States*, 304 U. S. 1 146
Motes v. *United States*, 178 U. S. 458 147
Mugler v. *Kansas*, 123 U. S. 623 46
Murphy v. *Webster*, 131 Mass. 482 59

Page

Myers v. *United States*, 272 U. S. 52 ..... 26, 45-112 *passim*
National Labor Relations Board v. *Thompson Prod-ucts, Inc.*, 141 F. (2d) 794 (C. C. A. 9th) 31
Neagle, In re, 135 U. S. 1 61
Nichols v. *Coolidge*, 274 U. S. 531 140
Nigro v. *United States*, 276 U. S. 332 94
Norton v. *Shelby County*, 118 U. S. 425 38
O'Donoghue v. *United States*, 289 U. S. 516 ..... 44, 45, 46, 69
Ohio Bell Tel. Co. v. *Public Utilities Comm'n.*, 301 U. S. 292 148
Opinion of the Justices, Re, 300 Mass. 598, 14 N. E. (2d) 465 59
Pacific Fisheries v. *Alaska*, 269 U. S. 269 95
Parsons v. *United States*, 167 U. S. 324 ..... 69, 71
Pemberton's Lessee v. *Hicks*, 3 Dall. 479 (Pa. Sup. Ct.) 114
People v. *Robb*, 126 N. Y. 180, 27 N. E. 267 57
People ex rel. *Burley* v. *Howland*, 155 N. Y. 270, 49 N. E. 775 ..... 42, 102
Pierce v. *Carskadon*, 16 Wall. 234 117
Pollock v. *Farmer's Loan & Trust Co.*, 157 U. S. 429 92
Pope v. *United States*, 323 U. S. 1 129
Priddie v. *Thompson*, 82 Fed. 186 (C. C. W. Va.) 67
Prigg v. *Pennsylvania*, 16 Pet. 544 69
Reagan v. *United States*, 182 U. S. 419 ..... 57, 81
Reid v. *Smoulter*, 128 Pa. St. 324, 18 Atl. 445 ..... 42, 102
Respublica v. *Doan*, 1 Dall. 86 (Pa. Sup. Ct.) 114
Respublica v. *Gordon*, 1 Dall. 233 (Pa. Sup. Ct.) 114
Ritter v. *United States*, 84 C. Cl. 293, *certiorari denied* 300 U. S. 668 48
Robertson v. *Coughlin*, 196 Mass. 539, 82 N. E. 678 57
Roller v. *Holly*, 176 U. S. 398 145
Russell Co. v. *United States*, 261 U. S. 514 61
Sheldon v. *Hoque*, 261 Ill. 222, 103 N. E. 1021 141
Shoemaker v. *United States*, 147 U. S. 282 62
Shreveport Rate Case, 234 U. S. 342 93
Shurtleff v. *United States*, 189 U. S. 311 ..... 57, 67
Sleigh v. *United States*, 9 C. Cl. 369 42
Sleight v. *Kane*, 2 Johns. 236 (N. Y.) 114
Snyder v. *Massachusetts*, 291 U. S. 97 146
Sonzinsky v. *United States*, 300 U. S. 506 95
Springer v. *Philippine Islands*, 277 U. S. 189 ..... 46, 61
State ex rel. *Hamby* v. *Cummings*, 166 Tenn. 460, 63 S. W. (2d) 515 141

Page

State ex rel. *Tolerton* v. *Gordon*, 236 Mo. 142, 139 S. W. 403 ..... 27, 41, 102, 148
State ex rel. *Worrell* v. *Carr*, 129 Ind. 44, 28 N. E. 88 ..... 42, 102
Stuart v. *Laird*, 1 Cranch 299 69
Thompson v. *Carr*, 5 N. H. 510 114
Thwing v. *United States*, 16 C. Cl. 13 37
Towne v. *Eisner*, 245 U. S. 418 84
United States v. *Allred*, 155 U. S. 591 37
United States v. *Andrews*, 240 U. S. 90 38
United States v. *Ballard*, 12 F. Supp. 321 (W. D. Ky.) 146
United States v. *Butler*, 297 U. S. 1 ..... 27, 90, 96, *et seq.*
United States v. *Cohen Grocery Co.*, 225 U. S. 81 146
United States v. *Constantine*, 296 U. S. 287 94
United States v. *Cooper*, 20 Dist. Col. 104 60
United States v. *Cruikshank*, 92 U. S. 542 146
United States v. *Dickerson*, 310 U. S. 554 ..... 25, 31, 37
United States v. *Eliason*, 16 Pet. 291 61
United States v. *Ferreira*, 13 How. 40 62
United States v. *Germaine*, 99 U. S. 508 ..... 81, 83, 84, 85
United States v. *Hartwell*, 6 Wall. 385 ..... 81, 85
United States v. *Klein*, 13 Wall. 128 ..... 95, 102, 121
United States v. *Langston*, 118 U. S. 389 ..... 31, 37
United States v. *Mitchell*, 109 U. S. 146 31
United States v. *Monat*, 124 U. S. 303 ..... 81, 84
United States v. *Perkins*, 116 U. S. 483 ..... 64 *et seq.*
United States v. *Smith*, 124 U. S. 525 ..... 81, 82
United States v. *Valte*, 223 U. S. 509 ..... 31, 37
United States ex rel. *Crow* v. *Mitchell*, 89 F. (2d) 805 (App. D. C.) 85, 87
University of Illinois v. *United States*, 289 U. S. 48 93
Veazie Bank v. *Fenno*, 8 Wall. 533 ..... 93, 94
Waddle v. *Hughes*, 260 Ky. 269, 84 S. W. (2d) 75 82
Wallace v. *Currin*, 95 F. (2d) 856 (C. C. A. 4th) *aff'd* 306 U. S. 1 140
Wallace v. *United States*, 257 U. S. 541 37
Ware v. *Hylton*, 3 Dall. 199 114
Ware v. *United States*, 4 Wall. 617 67
Wilcox v. *McConnel*, 13 Pet. 498 61
William Wells, Ex parte, 18 How. 307 60
Williams v. *United States*, 1 How. 290 61
Wisconsin v. *Pelican Ins. Co.*, 127 U. S. 265 69
Wood v. *United States*, 107 U. S. 414 73
Yong Sung Hee, 36 Fed. 437 (C. C. Ore.) 117

CONSTITUTION: Page

Article I, Section 1, clause 1 43
Section 2, clause 5 ..... 46, 63
Section 3, clause 5 63
clause 6 46
clause 7 ..... 46, 82
Section 8, clause 1 90
clause 17 ..... 47, 65, 66, 79, 91
Section 9, clause 3 ..... 112, 138
clause 7 90
Section 10, clause 1 112
Article II, section 1 58
Section 1, clause 1 47
Section 2 47
Section 2, clause 1 48
clause 2 ..... 62, 65, 80, 82, 85
Section 3 ..... 48, 61
Section 4 ..... 48, 80, 81
Article III 63
Article IV, Section 3, clause 2 90
Article VI 99
Article VII, Section 3 81
Amendment V ..... 138-154 *passim*
Amendment VI 146, 147
Amendment X 98

STATUTES AND BILLS:

Act of August 7, 1789 (1 Stat. 50) 59
Act of September 2, 1789 (1 Stat. 65) 76
Act of April 10, 1790 (Sec. 21, 1 Stat. 117) 125
Act of March 3, 1817 (3 Stat. 366) 76
Act of July 17, 1862 (12 Stat. 589) 125
Act of July 12, 1870 as amended (34 Stat. 48, 31 U. S. C. 665) 35, 36
Act of July 31, 1894 (28 Stat. 162) 76
Act of June 10, 1921 (42 Stat. 20) 76
Act of July 3, 1930 (46 Stat. 1005, 5 U. S. C. 678a) 36
Act of May 18, 1933 (Section 4(f), 48 Stat. 58) 77
Act of June 19, 1934 (48 Stat. 1006 as amended, 47 U. S. C. 154 (f) (1)) 36
Act of August 2, 1939 (Section 9A, 53 Stat. 1147) 8
Act of Settlement of 1701 (12 and 13 Wm. III, c. 2) 49
Appropriation for the Department of Agriculture (Sec. 3, 55 Stat. 408) 8

Page

Appropriation for the Department of Interior (Sec. 7, 55 Stat. 303) 8
Appropriation for Department of Labor (Sec. 704, 55 Stat. 466) 8
Appropriation for State, Commerce, Justice and the Judiciary (Sec. 504, 55 Stat. 265) 8
Appropriation for the War Department (Sec. 10, 55 Stat. 366) 8
Department of Justice Appropriation Act for 1942 (55 Stat. 292) 9
Department of Justice Appropriation Act for 1943 (56 Stat. 468) 9, 11
Emergency Relief Appropriation Act of 1941 (Secs. 15(f), 17(b), 54 Stat. 611) 8
Emergency Relief Appropriation Bill for 1942 ..... 106, 138
Federal Communications Act of 1934 (Act of June 19, 1934, 48 Stat. 1064, 48 U. S. C. Secs. 154(f), 154(k), 401, 402, 402(a)) 84, 87
H. R. 9766, 76th Cong. 137
H. R. 1644, 77th Cong. 138
H. R. 7505, 77th Cong. 107
H. R. 1648, 78th Cong. 12
H. R. 1433, 79th Cong. 140
H. Res. 105, 78th Cong. 12, 33
H. Res. 282, 78th Cong. 7
Interior Department Appropriation Bill for year ending June 30, 1940 (H. R. 4852) 105
Independent Offices Appropriation Bill for 1943 (H. R. 6430) 107
Legislative Branch Appropriation Act (Sec. 5, 55 Stat. 446) 8
Independent Offices Appropriation Act of 1942 (Act of April 5, 1941, Sec. 5, 55 Stat. 92) 8
National Defense Supplemental Appropriation Bill (H. R. 6159) 106
Ordinance of September 26, 1778 76
Organic Act of the Virgin Islands Section 21 (Act of June 22, 1936, 49 Stat. 1807, 1812; 48 U. S. C. Sec. 1405t) 83
Public Res. No. 8, 74th Cong. (49 Stat. 43) 87
Treasury-Post Office Appropriation Bill of 1944 (H. R. 1648) 11-12

Page

Urgent Deficiency Appropriation Act of 1943 (Sec. 304, 57 Stat. 431, 450) ..... *passim*
Urgent Deficiency Appropriation Bill, 1943 (H. R. 2714) 20
War Department Appropriation Bill, 1924 (H. R. 7877) 105
Rev. Stat. Sec. 3679 (34 Stat. 48, 31 U. S. C. 665) 35
1 Stat. 28 70
12 Stat. 502 117
13 Stat. 424 117
35 Stat. 1088, 1108, 1109, 18 U. S. C. Secs. 2, 59, 199, 202, 203, 207 125
35 Stat. 1112 125
48 Stat. 1093, Sec. 402(a) 87
54 Stat. 670, 18 U. S. C. Secs. 9-13 125
55 Stat. 396 106

LEGISLATIVE DOCUMENTS:

HOUSE—

H. Rep. No. 194, 24th Cong., 2d Sess. 52
H. Rep. No. 141, 45th Cong., 3d Sess. 126
H. Doc. 398, 69th Cong., 1st Sess. (1927), *Forfeiture of the Union* 44
H. Rep. No. 130, 73rd Cong., 1st Sess. 77
H. Doc. No. 340, 76th Cong., 1st Sess. (1939) 87
H. Doc. 833, 77th Cong., 2d Sess. 8, 9, 16
H. Rep. No. 1, 77th Cong., 1st Sess. 7
H. Rep. No. 1470, 77th Cong., 1st Sess. 106
H. Rep. No. 2641, 77th Cong., 2d Sess. 107
H. Rep. No. 2748, 77th Cong., 2d Sess. 7
H. Doc. No. 51, 78th Cong., 1st Sess. 11
H. Doc. No. 162, 78th Cong., 1st Sess. 11
H. Doc. No. 264, 78th Cong., 1st Sess. 23
H. Rep. No. 447, 78th Cong., 1st Sess. 20
H. Rep. 448, 78th Cong., 1st Sess. ..... 15 *et seq.*, 33
H. Rep. No. 514, 78th Cong., 1st Sess. 21
H. Rep. No. 593, 78th Cong., 1st Sess. 21
H. Rep. 607, 78th Cong., 1st Sess. 22
H. Rep. No. 618, 78th Cong., 1st Sess. 22
H. Rep. 661, 78th Cong., 1st Sess. 23

Page

Hearings before the Special Subcommittee of the Committee on Appropriations, House of Representatives, 78th Cong., 1st Sess., Acting under H. Res. 105 14

SENATE—

S. Rep. No. 23, 73d Cong., 1st Sess. 77
S. Rep. No. 2031, 76th Cong., 3d Sess. 138
S. Rep. No. 264, 78th Cong., 1st Sess. 21

CONGRESSIONAL DEBATES:

Journals of the Continental Congress (Lib. of Cong. ed.) 58

1 *Annals of Congress:*

372 81
376 57
377 51
380 51
381 ..... 51, 57
455 70
463 69
469 54
474 61
482 51
491 57
492 57
495-496 66
496 61
497 61
501-502 51
520-521 51
543 52
578-585 70
581-582 ..... 65, 100
585 52
611-612 76
614 76

14 *Annals of Congress:*

436 52

Page

11 *Cong. Deb.*:

470 71
513-524 71
553-563 71

1 *Cong. Globe*:

255 53
256 53
282-283 54
284-290 54
335 54

Cong. Rec., Vol. 59:

pp. 8609-8610 75
p. 8613 76

Cong. Rec., Vol. 65:

p. 1730 56
p. 1734 56
p. 1782 55
pp. 1981-1982 56
p. 2072 55
p. 2073 55
p. 2074 56
pp. 2076-2077 56
p. 2169 56
p. 2245 55
p. 2335 56
p. 4744 105
p. 5031 105
p. 5032 105
p. 5033 ..... 105, 137
p. 5036 105
p. 5041 105
p. 5042 ..... 105, 137
p. 5043 105

Cong. Rec., Vol. 83:

pp. 7568-7579 7
pp. 7568-7587 7

Page

Cong. Rec., Vol. 84:

p. 4308 105
p. 4312 105
p. 4342 106
p. 4346 106

Cong. Rec., Vol. 86:

p. 8184 137
p. 8200 137
p. 8201 137
pp. 8208-8213 137
p. A4155 138
p. A4184 138

Cong. Rec., Vol. 87:

p. 2540 106
p. 2596 106
p. 4072 107
p. 4677 107
p. 4959 106
p. 5110 106
p. 5111 106
p. 5113 106
p. 5515 106
p. 7675 138
pp. 9493-9494 106
p. A2984 ..... 106, 138

Cong. Rec., Vol. 88:

p. 3997 ..... 107, *et seq.*, 138
p. 3998 ..... 107, 138
p. 4000 ..... 109, 138
p. 4001 ..... 107, 109
p. 4004 109

Cong. Rec., Vol. 89:

pp. 474-486 11
p. 486 ..... 11, 32
p. 645 12
p. 646 32

Page

pp. 647-653 12
p. 655 12
p. 656 12
pp. 697-715 12
p. 698 33
p. 705 11
p. 708 12
p. 709-710 . . . . . 12, 32
p. 734 12
p. 735 33
pp. 740-741 33
p. 742 12
pp. 756-757 12
pp. 4482-4487 20
pp. 4546-4556 . . . . . 20, 109
p. 4547 109
p. 4548 . . . . . 109, 138
p. 4549 . . . . . 109, 138
pp. 4581-4605 20
p. 4582 34
p. 4583 123
pp. 4587-4588 109
pp. 4588-4591 . . . . . 17, 19
p. 4597 138
p. 4598 106
p. 4599 43
p. 4600 . . . . . 14, 15, 148
p. 4604 20
p. 4605 20
p. 5024 21
p. 5510 21
pp. 5513-5514 138
pp. 5514-5517 109
p. 5517 21
pp. 5603-5606 21
pp. 6369-6370 21
pp. 6407-6416 21
pp. 6693-6694 22
p. 6693 . . . . . 22, 109, 142
p. 6694 22
pp. 6729-6738 22
pp. 6868-6869 23
pp. 7003-7004 23

Page

pp. 7006-7008 23
p. 7008 ..... 14, 23, 149
p. 7014 23
pp. 7126-7235 23
pp. 7127-7128 34
p. 47962 13

OPINIONS OF THE ATTORNEY GENERAL:

1 Op. Atty. Gen. 629 76
3 Op. Atty. Gen. 188 62
3 Op. Atty. Gen. 409 81
4 Op. Atty. Gen. 1 74
4 Op. Atty. Gen. 603 ..... 61, 74
4 Op. Atty. Gen. 610 74
5 Op. Atty. Gen. 288 81
8 Op. Atty. Gen. 223 ..... 57, 74
12 Op. Atty. Gen. 32 ..... 63, 74
12 Op. Atty. Gen. 41 74
12 Op. Atty. Gen. 421 74
13 Op. Atty. Gen. 516 ..... 63, 67
17 Op. Atty. Gen. 419 81
30 Op. Atty. Gen. 51 35
30 Op. Atty. Gen. 79 74
30 Op. Atty. Gen. 83 74
37 Op. Atty. Gen. 56 96
37 Op. Atty. Gen. 227 84
40 Op. Atty. Gen. Nos. 73, 74 85

TREATISES AND DOCUMENTARY SOURCES:

Adams, Geo. B., *Constitutional History of England* (Schuyler rev. 1934) 114, 126, 131
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Bancroft, *History of the Constitution of the United States* (1881) 61
Blackstone, *Commentaries on the Laws of England* (3d ed. 1884) 113, 114, 117, 131, 135
Coke, *First Institute* (on Littleton) (Thomas ed. 1818) 135
Coke, *Fourth Institute* (1809 ed.) 113, 129

Page

Comyns, Sir John, *A Digest of the Laws of England* (4th ed. 1793) 113
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Vol. I, p. 21 59
p. 78 49

Vol. II, pp. 376-656 115
p. 428 49
pp. 448, 571 115
p. 550 50
pp. 596, 610, 656 115

Vol. III, p. 165 115

The Federalist (1802 ed.)
No. 44 ..... 113, 114
No. 47 44
No. 48 44
No. 65 ..... 113, 129
No. 66 113
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No. 79 ..... 42, 100
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Page

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Vol. III, p. 133 71
Vol. V, p. 598 98
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Vol. VIII, p. 379 72

Page

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Ch. XIV 90
Sec. 530 45
Sec. 688 129
Sec. 766 129
Sec. 795 129
Sec 922 94
Sec. 978 94
Sec. 1344 ..... 117, 127, 130, 132
Sec. 1373 ..... 114, 117
Sec. 1535 62
Sec. 1536 81
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Sec. 1537-1544 70
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MISCELLANEOUS

Page

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Note, 51 Harv. L. Rev. 1246 77
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Report by the Federal Communications Commission in the Matter of Goodwin Watson, Frederick L. Schuman and William E. Dodd, Jr., April 26, 1943, pp. 23-24 ..... 17, 18

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 809.

UNITED STATES, *Petitioner*,

v.

ROBERT MORSS LOVETT

No. 810.

UNITED STATES, *Petitioner*,

v.

GOODWIN B. WATSON

No. 811.

UNITED STATES, *Petitioner*,

v.

WILLIAM E. DODD, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR RESPONDENTS.

OPINIONS BELOW

The four opinions of the Court of Claims (R. 33-48) are not yet officially reported.

JURISDICTION

The judgments of the Court of Claims were entered on November 5, 1945 (R. 33, 41, 48-49). Petitions for writs of certiorari were filed on February 5, 1946, and were granted on March 25, 1946 (R. 49). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED

The Petition for Certiorari states the Questions Presented as follows:

1. Whether Section 304 of the Urgent Deficiency Appropriation Act, 1943, 57 Stat. 431, 450, *infra*, undertook to terminate the respondents' sevices, and not merely to prohibit disbursing agencies from paying their salaries.

2. If so, whether Section 304 is constitutional.

3. Whether, in view of Section 304 and the failure of the President to appoint respondents thereunder, the United States incurred a legal obligation to pay respondents for services rendered after November 15, 1943.

4. Was the Court of Claims presented with justiciable controversies.

STATUTE INVOLVED

Section 304 of the Urgent Deficiency Appropriation Act, 1943, 57 Stat. 431, 450, provides as follows:

> SEC. 304. No part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act, or (2) which is now, or which is hereafter made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States shall be used, after November 15, 1943, to pay any part of the salary, or other compensation for the personal services, of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has been appointed by

the President, by and with the advice and consent of the Senate: *Provided*, That this section shall not operate to deprive any such person of payment for leaves of absence or salary, or of any refund or reimbursement, which have accrued prior to November 15, 1943: *Provided further*, That this section shall not operate to deprive any such person of payment for services performed as a member of a jury or as a member of the armed forces of the United States nor any benefit, pension, or emolument resulting therefrom.

STATEMENT

The facts with respect to the three respondents were stipulated, and are set out in the Findings of the court below, which fully accepted the stipulated facts (R. 19-33). In addition, there are a number of other facts, all of them the proper subject of judicial notice since they relate to the Congressional proceedings on Section 304, which are not contained in the Findings. They are equally important in any adequate appraisal of the constitutional issue here involved.

a. The Respondents

The three respondents in these cases are the three persons named in Section 304, *supra*, p. 2. Each respondent, alleging that Section 304 is unconstitutional, brought suit to recover salary for work performed by him for the United States after November 15, 1943. Since essentially the same questions are raised in each of the three cases, they were briefed and argued together below, and are being similarly treated in this Court. The basic facts revealed by the Findings with respect to each of the respondents are as follows:

Robert Morss Lovett

Respondent Lovett was appointed by the Secretary of the Interior to be Executive Assistant to the Governor of the Virgin Islands on August 26, 1943, and took the oath

of office and entered on duty on October 12, 1943 (R. 19). He continued in that office until March 13, 1944, when he resigned (*ibid.*). Immediately prior to his appointment as Executive Assistant he had served as Government Secretary of the Virgin Islands, an office to which the President had appointed him on April 28, 1939 (*ibid.*).

Respondent Lovett received compensation in due course for his services up to November 15, 1943. From that time until he resigned on March 13, 1944, he received no compensation (R. 23-24). The reason is revealed by the Findings. On November 23, 1943, the Commissioner of Finance of the Virgin Islands (the officer authorized to certify the payment of respondent's salary) wrote to the Secretary of the Interior stating that in view of Section 304, he would not certify for payment the salary of respondent after November 15, 1943 (R. 22).

On November 26, 1943, the Secretary of the Interior wrote respondent, requesting that he continue in the office of Executive Assistant. The letter stated (R. 22-23):

> I wish to repeat the request that you continue in the office of Executive Assistant to the Governor. Funds may not be available to pay your salary until the unconstitutional prohibition of the Urgent Deficiencies Act is declared invalid by the courts. I am confident, however, that the prohibition will be so adjudged, and a principle fundamental to democratic government will be upheld.
>
> In no case are you to consider yourself discharged. You will continue to perform the duties of your office and to exercise all the authority conferred upon you by law.

And on November 29, 1943, upon receipt of the letter from the Commissioner of Finance, the Secretary of the Interior again wrote requesting respondent to continue in the Office of Executive Assistant (R. 23). Respondent in fact did continue in that office until his resignation on March 13, 1944 (R. 19-20). His demand that he be paid for his services has been refused (R. 23). The amount of money

which has been withheld from him solely because of Section 304 is $1,936.40 (R. 24). That is the amount which he seeks to recover in this proceeding.

GOODWIN B. WATSON:

Respondent Watson was appointed by the Federal Communications Commissions to be Chief of the Analysis Division, Foreign Broadcast Intelligence Service, on November 16, 1941 (R. 24). He took the oath of office and entered on his duties on the same day, and continued in active duty in that office through November 21, 1943 (*ibid.*). On May 2, 1944, he resigned, and his resignation was accepted on May 3, 1944, effective on May 21, 1944 (R. 24-25).

Respondent Watson, like Dr. Lovett, received compensation in due course for his services until November 15, 1943. From that time, and up to the time when he ceased the active performance of his duties on November 21, 1943, he received no compensation (R. 29). Again, as in the case of Dr. Lovett, the Findings give the reason. On November 22, 1943, the Secretary of the Federal Communications Commission, who is the certifying officer of the Commission, wrote to respondent as follows (R. 28):

> The Commission's records show that you have been on active duty with the Federal Communications Commission from November 7th through November 21st. Since the position which you hold pays a base salary of $6500 per annum, your compensation for this pay period, with overtime, would ordinarily be $297.01. However, in your case there is a provision of law which makes it impossible to pay you the full sum to which you would be otherwise be entitled.

Then, after quoting Section 304 (*supra*, pp. 2-3), the letter continued:

> Because of this provision, it is possible to compensate you only for your services from November 7th through

> November 15, 1943 and your compensation for this period with overtime is $178.21. Accordingly, after adjustment of tax deduction $23.60 and retirement deduction $8.13, there is enclosed a check for $146.68.

Respondent was given no instructions by the Commission to cease working on November 15, 1943; in fact the Commission permitted him to continue in his regular work for the period for which he now seeks payment—from November 15 to November 21, 1943 (R. 29). His demand that he be paid for those services has been refused (*ibid.*). The amount of money which has been withheld from him solely because of Section 304, is $101.78 (*ibid.*). He seeks recovery of that amount in this proceeding.

4

WILLIAM E. DODD, JR.

Respondent Dodd is in a position very similar to that of Dr. Watson. He was appointed by the Federal Communications Commission to be Editorial Assistant, Foreign Broadcast Intelligence Service, on December 1, 1941 (R. 29). He took the oath of office and entered on his duties on the same day (*ibid.*). He continued in active duty in that office until December 22, 1942, when he was appointed by the Commission to be Assistant News Editor, Foreign Broadcast Intelligence Service, and he continued on active duty in that office until November 21, 1943 (*ibid.*). From November 21, 1943 to the date of the Stipulation, respondent has been on a leave-without-pay status (R. 30).

Like Dr. Watson, respondent Dodd received compensation for his services in due course until November 15, 1943 and was not paid thereafter (R. 32). On November 22, 1943, he likewise received a letter from the Secretary of the Federal Communications Commission, which is identical, *mutatis mutandis*, with that received by Dr. Watson (R. 32). Respondent Dodd seeks recovery in this proceeding of $59.83 (R. 33).

b. The Statute

Section 304 of the Urgent Deficiency Appropriation Act of 1943 is, so far as we know, the first statute in our history in which Congress has purported to ban certain named individuals from ever again holding a gainful position with their government. We believe, of course, that it is unconstitutional. But we also believe that no judgment on the constitutional issue can be made without an understanding of its background and the method of its enactment.

The House of Representatives, where Section 304 originated, had long been irked because, as the House saw it, the Executive branch had taken inadequate action against "subversives" in the Government service. Section 304 is the culmination of that irritation. By the device of a "rider" on a vital appropriation bill, the House succeeded in forcing unwilling acquiescence in its plan from the Senate. The President, although he believed Section 304 to be invalid, and not binding upon him, also signed the bill because of the vital appropriation which it contained. It will be helpful in presenting the argument if we trace, as briefly as possible, the origins and nature of the dispute between the House and the Executive branch, the manner in which these three plaintiffs became involved in it, the action taken by the House with respect to each plaintiff, and the final drafting and passage of Section 304.

The origin and nature of the dispute—In May, 1938 the House of Representatives created a Committee on Un-American Activities—better known as the Dies Committee (H. Res. 282, *Cong. Rec.*, Vol. 83, pp. 7568-7587). The announced impetus for the Committee was a need for investigating Nazi and Fascist activities (see *Cong. Rec.*, Vol. 83, pp. 7568-7570), but its emphasis soon shifted to the investigation of Communists and "left-wing" groups. See, *e. g.*, its early reports: H. Rep. No. 1, 77th Cong., 1st Sess.; H. Rep. No. 2748, 77th Cong., 2d Sess., *passim*.

But the Dies Committee was not the only manifestation of the interest of Congress in Communism and Communists.

particularly those claimed to be in the Federal service. In late 1939 the Hatch Act was passed, Section 9A of which stated (Act of August 2, 1939, 53 Stat. 1148, 1149):

> (1) It shall be unlawful for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any Act of Congress, to have membership in any political party or organization which advocates the overthrow of our Constitutional form of government in the United States.
>
> (2) Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any Act of Congress for such position or office shall be used to pay the compensation of such person.

In June 1940 a similar limitation was incorporated in the Emergency Relief Appropriation Act of 1941 (Sections 15(f), 17(b), 54 Stat. 611), and in early 1941, Congress began the practice of including in all appropriation bills a similar prohibition, together with criminal penalties for its violation.[1]

The Executive Branch—primarily, of course, the Department of Justice—took appropriate cognizance of these acts. Initially, under the Hatch Act, complaints in this respect about any Federal employee were referred to the agency in which he worked, and the Federal Bureau of Investigation was assigned to make an investigation and report only upon the request of that agency (See H. Doc. 833, 77th Cong., 2d Sess., pp. 6-7). In June 1941, however, a special appropria-

[1] See, *e.g.*, Independent Offices Appropriation Act, 55 Stat. 92, Sec. 5; Appropriation for State, Commerce, Justice and the Judiciary, 55 Stat. 265, Sec. 504; Appropriation for the Department of Interior, 55 Stat. 303, Sec. 7; Appropriation for the War Department, 55 Stat. 366, Sec. 10; Appropriation for the Department of Agriculture, 55 Stat. 408, Sec. 3; Legislative Branch Appropriation Act, 55 Stat. 446, Sec. 5; Appropriation for Department of Labor, 55 Stat. 466, Sec. 704.

tion was made for the purpose of these investigations; the Department of Justice Appropriation Act provided (55 Stat. 292):

> * * * at least $100,000 shall be available exclusively to investigate the employees of every department, agency and independent establishment of the Federal Government who are members of subversive organizations or advocate the overthrow of the Federal Government, and report its findings to Congress.

And in October 1941 the Department of Justice changed its investigation policy. The Attorney General advised all agencies that thereafter the F. B. I. would "institute investigations of this type, without notice to the head of the employing department or agency, whenever the F. B. I. receives information or complaints showing reasonable grounds for taking action" (H. Doc. 583, *supra*, pp. 9-10). Moreover, the widest scope was given to the legislative mandate. Literally, Congress had directed investigation only of employees who were members of "subversive" organizations; but in order that the investigation should be fully adequate, investigations were also made of employees who were members of organizations not subversive, but as to which the Department had reason to suspect Communist backgrounds or Communist connections (*id.* pp. 12-13).

The results of these F. B. I. investigations were (and are now, since the work has not ceased), submitted to the department or agency in which the employee worked. The F. B. I. report contained no conclusions or recommendations; administrative action to be taken was, and is, in the hands of the head of the department or agency involved (*id.* p. 11).[2]

---

[2] In April 1942, the Attorney General created a committee known as the Interdepartmental Committee, in order that there might be some agency to correlate the actions taken by the various departments or agencies on the F. B. I. reports and to make recommendations in other ways to assist in carrying out the mandate of the Department of Justice Appropriation Acts (*id.* pp. 18-28).

Under this first appropriation of $100,000, the F. B. I. dealt with complaints against some 4,579 Federal employees up to August 22, 1942. Of these, about 1,100 were supplied by the Chairman of the Dies Committee. By the same date, the F. B. I. had completed and forwarded to the appropriate agency or department, 2,095 reports, and had been informed of the disposition of the cases by the employing agency in 1,725 cases. From all of this, 36 persons were reported separated from the Federal service—only 2 of them being from the Dies list. There were 13 more who were reprimanded or transferred from national defense employment (*id.* pp. 17-18).

The Attorney General, reporting to Congress as required by the Act, was strongly critical of such wholesale investigations (*id.* pp. 1-5). He and the Interdepartmental Committee agreed that "results achieved have been utterly disproportionate to resources expended" (*id.* p. 4). A large proportion of the complaints, he stated, were "clearly unfounded", and "should never have been submitted for investigation in the first instance", and "this is conspicuously true of the list submitted by Congressman Dies" (*id.* pp. 3-4). After pointing out that the Dies list was largely based upon the appearance of the subject's name on the "active indices" of various organizations, he quoted the Interdepartmental Committee as stating: "In all but a small residuum of the cases, the lead provided by the 'active indices' of front organizations proved to be utterly worthless" (*id.* p. 4). The Attorney General added (*ibid.*):

> Moreover, it is now clear that the objective test of membership in a "front" organization is thoroughly unsatisfactory. Appraisal of an individual's political opinions and points of view is difficult enough at best. The objective test fails completely where "subversive" character is so imperfectly indicated and where the purposes of the organization are so stated as to make membership in most circumstances consistent with loyalty.

Before this report had been received by Congress, however, the Department of Justice Appropriation Act for 1943 had been enacted (56 Stat. 468, 482), and an additional $200,000 had been appropriated. The further investigations, however, revealed nothing to change the Attorney General's former conclusion. The reports of the F. B. I. for the first and second quarters of the fiscal year 1943 (H. Docs. 51, 162, 78th Cong., 1st Sess.) reveal that by March 31, 1943, the number of employees complained of had risen to 4,948, the number of completed investigations had risen to 2,303 and the department or agency had reported the results to the F. B. I. in 2,118 instances. Of this latter number, the employing agencies reported 43 separations from the Federal Service, and 39 cases of other administrative action (H. Doc. 162, 78th Cong., 1st Sess., p. 5). From the 1,100 names in the Dies list, the examinations of which had been completed, there were 4 persons separated, and 2 cases of other administrative action (*id.* p. 4).

The respondents' connection with the dispute.—On February 1, 1943, Mr. Dies made a long speech in the House (*Cong. Rec.*, Vol. 89, pp. 474-486), attacking 39 named individuals in various government departments, including the three respondents here, as "irresponsible, unrepresentative, crackpot, radical bureaucrats" (*id.* p. 479). These individuals had not been the subject of any action by the Dies Committee itself (*id.* p. 705); the charges were only those of Mr. Dies personally. At the end of his speech he said (*id.* p. 486):

> Congress does have a remedy. If we cannot obtain relief from one source, then we as Members can say, "If you do not get rid of these people we will refuse to appropriate money for their salaries." * * * I submit it is now in order that the Committee on Appropriations take immediate and vigorous steps to eliminate these people from public office.

Four days later, on February 5, 1944, Mr. Hendricks of Florida offered an amendment to the Treasury-Post Office

Appropriation Bill (H. R. 1648) providing: "no part of any appropriation contained in this Act shall be used to pay the compensation of" the 39 individuals attacked by Mr. Dies (*Cong. Rec.*, Vol. 89, p. 645). During debate on the Hendricks amendment, many Congressmen made known their opposition to such a procedure, and others objected to any action taken with so little knowledge of the facts. See *id.* pp. 647-653. Moreover, it was pointed out that but one of the 39—Mr. William Pickens—was employed by either the Treasury Department or the Post Office, and that consequently the amendment was pointless as to the other 38. The House finally rejected the Hendricks amendment (*id.* p. 655), but Mr. Hendricks immediately offered another amendment which contained only the name of Mr. Pickens, and this was adopted (*id.* p. 656).

During the next few days, however, various members of the House discovered that Mr. Pickens was a Negro—the only one among the 39—and that unwittingly they had appeared to discriminate against him on racial grounds (see, *e. g.*, *id.* p. 708). On February 8, during further debate on the bill, it became apparent that many who had voted for the Pickens amendment were anxious to change their votes (*id.* pp. 697-715). The formula was supplied by the Chairman of the Committee on Appropriations, Mr. Cannon, of Missouri. He announced that he would introduce a resolution creating a special subcommittee of the Committee on Appropriations to hear charges against any Government employee, and, if the charges were sustained, to take immediate action separating him from the payroll (*id.* pp. 709-710). This resolution (H. Res. 105) was reported to the House on February 9 (*Cong. Rec.*, Vol. 89, p. 734), and was agreed to without a record vote (*id.* p. 742). Then the Pickens amendment was rejected (*id.* pp. 756-757).

House Resolution 105 authorized and directed the Committee on Appropriations, acting through a special subcommittee thereof appointed for the purpose—

> to examine into any and all allegations or charges that certain persons in the employ of the several executive departments and other executive agencies are unfit to continue in such employment by reason of their present association or membership or past association or membership in or with organizations whose aims or purposes are or have been subversive to the Government of the United States.

The Committee was further authorized to incorporate in any appropriate bill any legislation approved by it as a result of the resolution.

The proceedings against these respondents in the House. —The subcommittee appointed under the resolution was headed by Mr. John H. Kerr of North Carolina, and became known as the Kerr Committee. It apparently met on March 23, 1943, and adopted rules of procedure (See *Cong. Rec.*, 78th Cong., 1st Sess., Appendix, p. 7962), but it did not hold its first hearing until April 9 (R. 20-21).

Each of the present respondents appeared before the Kerr Committee. The letter from the Committee to Dr. Watson (stated to be an "invitation", R. 26) is included in the Findings (*ibid.*). It is dated April 7, was presumably received April 8, and announces a meeting on his case on April 9.[3] After stating that the Kerr Committee had before it the files of the Dies Committee, the Civil Service Commission, the F. B. I. and the Federal Communications Commission "relative to your qualifications and suitability as a federal employee", the letter continued:

> The committee will examine these files beginning Friday, April 9, 1943, at 10:00 A. M. and you are instructed to appear at room 449 Old House Office Building at such time when opportunity will be afforded you to answer these charges and interrogations by the Committee.
>
> A statement and list of the charges preferred against you before this committee by the Committee on

[3] Respondent Lovett was summoned to a meeting on April 15 by a letter handed him on April 14 (R. 21).

> Un-American Activities, House of Representatives, is immediately available for your inspection at the office of this committee.

Respondents Lovett and Watson did not attempt, in the few hours which intervened between their "invitations" and their session with the Kerr Committee, to see the charges against them (R. 21, 27). Respondent Dodd did, and was told by the Clerk of the Kerr Committee that it had formulated no charges against him (R. 30).

All of the proceedings of the Kerr Committee were in executive—*i.e.*, secret—session, and each of the respondents appeared alone before it (R. 21, 27, 30-31). The first person summoned (not one of the respondents) appeared accompanied by the general counsel of the agency where he worked—the Federal Communications Commission. The latter requested permission to appear as an observer, but withdrew when he was told that the subcommittee had decided to hold its hearings "without any persons other than the subcommittee, its staff and the witness being present" (R. 27, 30-31). The attempt by the Solicitor of the Department of the Interior to attend the hearings with Dr. Lovett met a similar response (R. 21).

The proceedings of the Kerr Committee during its interrogation of the respondents were printed by the Committee (*Hearings before the Special Subcommittee of the Committee on Appropriations, House of Representatives, 78th Cong., 1st Sess., Acting under H. R. 105*, cited hereafter as Kerr Hearings). This pamphlet was made available to members of Congress only about June 30, 1943, when Senate pressure for information compelled abandonment to this extent of the policy of secrecy.[4] Even now, of course, only

[4] See *Cong. Rec.*, Vol. 89, p. 7008. It appeared that the Kerr Committee had originally decided that it was to serve as a sort of jury, and report to Congress only its conclusions as contained in its report and its recommendations. See Keefe, a member of the Committee, *Cong. Rec.*, Vol. 89, p. 4600. Even the Hearings which were printed are, of course, but a small portion of the material before the Subcommittee. See R. 21, 27, 30.

the five members of the Kerr Committee know the evidence upon which that Committee made its recommendations; respondents and the rest of Congress are alike in ignorance. Everything was and is secret except the "hearings", and the "charges" against two of the three respondents (Kerr Hearings, *supra*, Appendices A, B. Dodd was apparently never "charged" with anything). Mr. Keefe, a member of the Kerr Committee, told the House that "much" of the material was such that they had to assure the F. B. I. and the Army and Navy Intelligence services that the Subcommittee would not make it public (*Cong. Rec.*, Vol. 89, p. 4600). Apparently the same arrangement was made with the Dies Committee. (See R. 21, 27, 30.)

The reports of the Kerr Committee.—On April 21, 1943, the Kerr Committee submitted to the Committee on Appropriations, and also made public, its first report (H. Rep. No. 448, 78th Cong., 1st Sess., pp. 3-7). The report stated (*id.* p. 4) that it had dealt with the investigations "as in the nature of an inquest of office" with the ultimate object of purging the public service of anyone found guilty of "subversive activity". Noting that "subversive activity" had not been defined by Congress or by the courts, the Kerr Committee had formulated its own definition (*id.* p. 5):

> Subversive activity in this country derives from conduct intentionally destructive of or inimical to the Government of the United States—that which seeks to undermine its institutions; or to distort its functions, or to impede its projects, or to lessen its efforts, the ultimate end being to overturn it all. Such activity may be open and direct as by effort to overthrow, or subtle and indirect as by sabotage.

As will appear from the argument below, we believe that nothing in this case turns on the findings of the Kerr Committee. Its investigation might have been generated by, and concerned itself with, the belief that atheists permeated the Government, or that members of the Government service entertained an attitude on divorce which was objec-

tionable, or were inclined to drive too fast. We believe that irrespective of the basis for its action, Congress has here undertaken to assert a power denied it by the Constitution. Our analysis of the findings with respect to these respondents, therefore, is for the convenience of the Court, and is in no sense an argument that the decision should in any degree be dependent upon those facts.

The first report of the Kerr Committee "found" that Dr. Watson and Mr. Dodd had engaged in "subversive activity within the definition adopted by the Committee" (H. Rep. No. 448, *supra*, pp. 5-7). Dr. Watson, the Subcommittee stated, admitted "association or affiliation" with 12 organizations, which it listed. None of the 12 organizations, the Subcommittee admitted, had been adjudged "subversive" by the courts or by Congress (*id.* p. 5). The Subcommittee asserted, however, that "a number of" the organizations had been "designated by the Department of Justice as 'front organizations' and other as 'questionable' " (*ibid.*), and in the next paragraph referred to all of the organizations as "associations whose aims and purposes were subversive to this Government" (*id.* p. 6).

Conceivably, the Subcommittee had information, including information as to Department of Justice findings with respect to these organizations, which has never been revealed to Congress, to the respondents, or to the public. But unless this be so, the Subcommittee's statement is inconsistent with the Department's position. The Attorney General, at least, had told the Subcommittee only two months earlier that these so-called "front" organizations were "*not* regarded as subversive within the legislative mandate" of the appropriation acts (see letter dated March 8, 1943, from the Attorney General to Chairman Kerr, Appendix, *infra*, pp. i-iii, italics ours), and the F. B. I. and the Interdepartmental Committee had made similar reports to Congress (H. Doc. No. 833, 77th Cong., 2d Sess., pp. 12, 19-20). The Attorney General had directly denied that the associations had "aims and purposes" which were subver-

sive; on the contrary, he had stated that "the purposes of [these organizations] are so stated as to make membership in most circumstances consistent with loyalty" (*id.* p. 4). The Interdepartmental Committee had described them by stating that "generally they professed the highest patriotism. Frequently their platforms or programs were calculated to enlist the adherence and support of large numbers of people who would not consciously have had anything to do with an organization inspired or dominated by Communists, Nazis, or Fascists" (*id.* p. 19). Finally, the Attorney General had specifically warned Congress, on the basis of full F. B. I. experience, that no weight whatever could be attributed to association or affiliation with them (*ibid.*). This, too, is flatly contrary to the conclusion of the Subcommittee that "membership and association * * * with the organizations mentioned * * * constitute subversive activity" (H. Rep. No. 448, *supra*, p. 6).

Of the 12 organizations listed for Dr. Watson, only 3 appeared in the Attorney General's letter to the Committee listing all those known to the Department of Justice (Appendix, *infra*, pp. i-iii), although this fact was never revealed by the Subcommittee. So far as the other 9 are concerned, there is no way of knowing upon what basis they were found "subversive" (H. Rep. No. 448, *supra*, pp. 5, 6). The Attorney General, at least, did not so regard them any more than, presumably, he did the dozens of other organizations with which Dr. Watson admitted much closer affiliation (*Report by the Federal Communications Commission in the Matter of Goodwin Watson, Frederick L. Schuman and William E. Dodd, Jr.*, April 26, 1943, pp. 23-24. Reprinted in *Cong. Rec.*, Vol. 89, pp. 4588-4591.). Again, it is conceivable that the Subcommittee had knowledge of which all the rest of Congress and the respondents are unaware, but it is certainly difficult, in the light of the Attorney General's letter, to know what it could be.

In any event, Dr. Watson was convicted because, as the Subcommittee stated, this "association or affiliation", the

writing of articles for several magazines (not named) "*reputedly* controlled by subversive interests" (italics ours), and Dr. Watson's views and philosophies expressed in various writings, "constitute subversive activity". Dr. Watson was therefore declared unfit "to continue in Government employment" (H. Rep. No. 448, *supra*, p. 6).

The Subcommittee's findings as to Mr. Dodd were somewhat different (*id.* pp. 6-7). He had, at one time, been a member of two so-called "front organizations". The same comments are applicable to this finding as have already been made with respect to the similar findings as to Dr. Watson.[5] In addition, as to one of these organizations—the Washington Bookshop—the Subcommittee failed to state that the Department of Justice had specifically warned (Appendix, pp. i-iii) that the list it had furnished the Subcommittee did *not* apply to "mere patrons or subscribers" of the Bookshop, which was Mr. Dodd's only connection with it (Kerr Hearings, pp. 124-125). Second, the Subcommittee found that Mr. Dodd had "association with Communists" because he had allowed a cocktail party for Harry Bridges to be held in his apartment "although he knew deportation charges were pending against Mr. Bridges (H. Rep. No. 448, *supra*, p. 6). Finally, the Subcommittee found that he had made a statement "quoted in The World Hails The 20th Anniversary of The Soviet Union" (*id.* p. 7). All this, the Subcommittee found to be "subversive activity", and it concluded that Mr. Dodd was therefore unfit to continue in Government employment.

On April 26, 1943, the Federal Communications Commission filed a full, 26-page Report on the Kerr Committee conclusions. *Report by the Federal Communications Commission in the Matter of Goodwin Watson, Frederick L. Schu-*

[5] The Subcommittee also referred to "a long list of organizations under whose auspices he had lectured or with whom he had been associated" (H. Rep. No. 448, *supra*, p. 7), but, except by implication, did not indicate anything in this which was subject to criticism.

man and William E. Dodd, Jr. (reprinted in *Cong. Rec.*, Vol. 89, pp. 4588-4591). The Commission not only fully analyzed the Committee's accusations, but it set out a summary of the great body of affirmative evidence of loyalty of both Dr. Watson and Mr. Dodd, including the high praise which their work at the Commission had received (none of which the Kerr Committee had mentioned). Upon all the evidence the Commission concluded: "We find no basis or reason for the dismissal of Watson, Schuman[6] or Dodd from employment by the Federal Communications Commission" (*id.* p. 26).

The second report of the Subcommittee was made on May 14, 1943, and dealt with three members of the Department of the Interior, including respondent Lovett (H. Rep. No. 448, *supra*, pp. 8-14). Dr. Lovett, the Subcommittee found, had admitted "membership or association or affiliation" with six organizations which the Subcommittee stated were "found to be within the scope of the mandate" of the Department of Justice Appropriation Acts (*id.* p. 9). This "finding" as to these organizations—a finding which later in the report the Committee attributes to the Department of Justice—is again a misrepresentation of the actual position of the Department of Justice. The letter from the Attorney General had plainly stated that the organizations to which the Committee referred were "not regarded as subversive within the meaning of the legislative mandate" (Appendix, *infra*, pp. i-iii)—although Congress, of course, did not know of the Attorney General's letter. Despite this fact, however, and despite the Attorney General's warning against reliance upon such evidence (*supra*, p. 10), the Subcommittee found that Dr. Lovett was "unfit to continue" in the employment of the United States Government (H. Rep. No. 448, *supra*, p. 12). The strong appeal from the Secretary of the Interior for the retention of Dr. Lovett, which the Subcommittee acknowledged, was rejected (*ibid.*).

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[6] Mr. Schuman had been investigated and acquitted by the Kerr Committee (H. Rep. No. 448, *supra*, p. 6).

The two other individuals from the Department of the Interior who were discussed in the report were acquitted (*id.*, pp. 12-14).

Legislative action on Section 304.—The full Committee on Appropriations made no real review of its Subcommittee's findings, at least of those as to Dr. Lovett, for on May 14, 1943, the same day that the Subcommittee made its second report, the full Committee reported identical conclusions to the House (H. Rep. No. 448, *supra*, pp. 1-2). The report stated that the Committee had directed the offering of the following amendment to the Urgent Deficiency Appropriation Bill, 1943 (H. R. 2714):

> SEC. 304. No part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act, or (2) which is now, or which is hereafter made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States, shall be used to pay any part of the salary, or other compensation for the personal services of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett: *Provided*, That this section shall not operate to deprive any such person of payment for leaves of absence or salary, or of any refund or reimbursement, which have accrued prior to the date of the enactment of this Act.

The Urgent Deficiency Appropriation Bill, 1943, was also reported to the House on May 14 (H. Rep. No. 447, 78th Cong., 1st Sess.), and controversy immediately began on the rider. After several days of debate, in which the rider was vigorously attacked as both unconstitutional and unwise (see *Cong. Rec.*, Vol. 89, pp. 4482-4487, 4546-4556, 4581-4605), it passed the House by a vote of 318 to 62 (*id.*, p. 4605).[7]

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[7] Prior to its adoption by the House on this occasion, it was amended by the addition of the second proviso which it now contains, exempting from its prohibition amounts earned for jury duty or service in the armed forces (*Cong. Rec.*, Vol. 89, p. 4604).

Originally, the rider got very short shrift in the Senate. The Senate Appropriation Committee, without discussion, voted an amendment eliminating the rider (S. Rep. No. 264, 78th Cong., 1st Sess., p. 5), and its action was sustained by the Senate (*Cong. Rec.*, Vol. 89, p. 5024).

The first conference report, on June 1, left the issue still in disagreement (H. Rep. No. 514, 78th Cong., 1st Sess.). On June 8, the House, without a record vote, agreed to a motion to insist on its disagreement with the Senate amendment (*Cong. Rec.*, Vol. 89, pp. 5510, 5517). But the Senate was even more emphatic; on June 10, after a debate in which many Senators, including Senator McKellar, the conference committee chairman, joined in denouncing the bill as unconstitutional, arbitrary, unfair and unwise, the Senate voted unanimously—69 to 0—to insist on its amendment (*id.* pp. 5603-5606).

Despite this unqualified expression of the Senate's views, in the next conference report (H. Rep. No. 593, 78th Cong., 1st Sess.) the Senate conferees had agreed to the rider. The House approved the report on the same day without a record vote (*Cong. Rec.*, Vol. 89, pp. 6369-6370). The Senate, however, stuck to its guns. Senator McKellar explained for the conferees that the bill contained many appropriations "essential to the prosecution of the war", that the House conferees "have refused to agree to any deficiency appropriation bill which does not contain this provision", that it was "hoped that the Government will continue to employ these men for a while, anyway, so that they may bring suit for their salaries and thus raise the [constitutional] question", and that consequently they had agreed with the House even though "the majority of our [conference] committee do not believe that under the Constitution Congress has the right to get rid of employees in that way, even after full hearings" (*id.* pp. 6407-6408). Despite Senator McKellar's plea, and after full debate, the conference report was rejected, 52 to 17 (*id.* pp. 6407-6416).

Five days later, on June 28, the conferees again reported (H. Rep. No. 607, 78th Cong., 1st Sess.). Section 304 had been modified to its present form; as the report stated, it was changed "so as to prohibit the use of Federal funds for the employment [of Lovett, Watson and Dodd] after November 15, 1943, unless such persons, prior to that date, have been appointed by the President by and with the advice and consent of the Senate" (*id.* p. 3).

The compromise plan was first considered by the Senate early on June 29, 1943. Senator Barkley argued strongly against the constitutionality of the measure (*Cong. Rec.* Vol. 89, p. 6693-6694). On the other side, Senator McKellar told the Senate that the House conferees had "stated that they would stand right where they were" (*id.* p. 6694), and that the Senate had to decide "whether we want to stand where we are and not have any bill" (*ibid.*). The conference report was, however, rejected, by a vote of 43 to 31 (*id.* p. 6694). The Senate was beginning to weaken before the determination of the House.

Later, on the same day—June 29, 1943—the conferees filed another report, substantially identical with that upon which the Senate had just voted (H. Rep. No. 618, 78th Cong., 1st Sess.). For a second time that day the Senate considered it, and it was again rejected, this time by the very narrow margin of 35 to 32. Senator McKellar again emphasized that in his judgment it was a question of balancing the salary of three people against the salary of several hundred thousand policemen, teachers and Congressional employees (Cong. Rec., Vol. 89, pp. 6729-6738). After the vote rejecting the report, Senator McKellar attempted to withdraw as a conferee, stating (*id.* p. 6738):

> I am sorry for the page boys. I wish to tell them that I did everything I could for them, and for the boys over in the House, for the school teachers, the policemen, and thousands of other employees throughout the country, who not only will not receive any increase in salary, but will not receive their salaries. I am very

> sorry. I meant no harm in being persistent. I greatly regret that the Senate has not stood by the Senate conferees.

On June 30, the House rejected a motion that it recede from its position by a vote of 301 to 71 (*id.* pp. 6868-6869).

With this renewed expression of the intransigent attitude of the House before them, the conferees brought in another report, again substantially identical with the two prior ones (H. Rep. 661, 78th Cong., 1st Sess.). The Senate considered it on July 2 (*Cong. Rec.*, Vol. 89, pp. 7003-7004). On this occasion there was available to the Senate, for the first time, the transcript of the Hearings of the Kerr Committee. (See *Cong. Rec.*, Vol. 89, p. 7008), so this time Senator McKellar based his plea for Senate approval of the conference report on the "facts"—a bitter denunciation of the "three Communists" (*id.* pp. 7006-7008). (No one before or since, so far as we are aware, has asserted that the respondents are Communists.) He stated (p. 7008):

> Let me say to the Senate that the pages are as fine a group of young boys as I have ever known. Even if only one of them was involved I would vote to give him his salary, the three Communists to the contrary notwithstanding; constitutional questions notwithstanding.

The Senate finally yielded, and voted 48 to 32 to sustain the conference report (*id.* p. 7014). The House approved it on the following day (*id.* pp. 7126-7135).

The President, although he believed that the rider—Section 304—was unconstitutional, signed the bill on July 12, 1943. As soon as Congress reconvened, the President sent to Congress a message dealing with the bill (H. Doc. No. 264, 78th Cong., 1st Sess.), in which he stated that he had "reluctantly" signed it, and then only "because it appropriates funds which were essential to carry on the activities of almost every agency of the Government during the recess of the Congress". The President added: "The Senate yielded, as I have been forced to yield, to avoid delaying

our conduct of the war. But I cannot so yield without placing on record any view that this provision is not only unwise and discriminatory, but unconstitutional."

c. The Present Position of the Respondents

The President, believing, as he had informed Congress, that the rider was unconstitutional, and not binding upon him (H. Doc. No. 264, *supra*), took no action under it. Presidential appointments of Messrs. Lovett, Watson and Dodd under the proviso in Section 304 would have been wholly inconsistent with the President's publicly stated belief that the law was ineffective for any purpose.

Congress has purported, therefore, by this rider, to put these three respondents in the position that they may never again have gainful employment by the United States (except as a juror or a soldier). The ban is categorical—no part of any "appropriation, allocation or fund" under the 1943 Urgent Deficiency Act or "which is now, or which is hereafter made, available under or pursuant to any other Act", and "to any department, agency, or instrumentality of the United States" shall be used after November 15, 1943, to pay "any part of the salary, or other compensation for the personal services" of these three men.

d. The Decision Below

Four opinions were handed down in the Court of Claims. That styled "the opinion of the court" (R. 33-41), and concurred in by Chief Justice Whaley and Judge Littleton, held that the respondents were entitled to recover, but did not reach the issue as to the constitutionality of Section 304. Each of the other three judges, however, while agreeing that respondents were entitled to recover, bottomed their decision on the unconstitutionality of Section 304. Judge Whittaker held that the section was in violation of Article I, Section 9, Clause 3 of the Constitution stating that "No bill of

attainder or ex post facto law shall be passed" (R. 41-42), and found it unnecessary to consider the other constitutional objections. Judge Jones, stating that the single issue in the case was as to the power of Congress to enact Section 304 (R. 42), held (R. 42-44) that it exceeded Congressional power. Judge Madden held (R. 44-48) that the section was unconstitutional both as a violation of the Fifth Amendment, and as inconsistent with Article I, Section 9, Clause 3 of the Constitution. All five judges agreed that respondents were entitled to recover.

On November 5, 1945, judgment was entered in favor of each of the respondents (R. 48-49). The petition for certiorari was filed on February 5, 1946, and was granted on March 25, 1946 (R. 49).

SUMMARY OF ARGUMENT

I.

The only issue in these cases is the Constitutional validity of Section 304. The minority view below, that Congress intended Section 304 as nothing more than a "stoppage of disbursing routine", and that consequently respondents are entitled to judgment even if the section be valid, is contrary to every canon of construction. All evidence, from the language of the section, from its legislative history, and from its necessary effect, if valid, points to an intention on the part of Congress to remove respondents from office on November 15, 1943, or at least to prevent any obligation to them for salary from being created after that date. *United States* v. *Dickerson*, 310 U. S. 554. If it be valid, therefore, it is an effective bar to recovery. If it be invalid, however, as we believe it is, it had no effect on either the tenure of respondents' offices nor on the obligation of the United States to compensate them for their services, and they are entitled to recover.

II

The first constitutional objection to Section 304 is that it constitutes an invasion of the powers and responsibilities of the executive branch of the Government, in that its purpose as well as its effect, if valid, is to remove respondents from the Government service, and keep them out. Congress has not been granted, by the Constitution, a power directly to remove the individual incumbents of Government positions, except in the legislative branch, and except by the constitutional process of impeachment. In the light of the separation of powers principle, a power of direct removal in Congress would necessarily require affirmative evidence of its existence. Actually, the contrary is true; all evidence indicates that Congress possesses no such power. The specific grant to Congress of the impeachment power itself suffices to negative any grant of a general removal power, as both its history in the Constitutional Convention and its subsequent interpretation confirm. But if more proof be needed, it is supplied by the specific grant to the executive of the power to appoint, with its well-recognized concomitant power to remove, and by the very nature of the grant of "the Executive Power", as adumbrated by the experience under the Articles of Confederation, the nature of executive power, and the explanations contained in the great debate of 1789 in Congress. Neither the Congressional power to "vest" the power of appointment of certain officers, nor the "necessary and proper" clause, supply any basis for a contrary construction. *Myers* v. *United States*, 272 U. S. 52, 161. Nothing in either the *Myers* case, nor in *Humphrey's Executor* v. *United States*, 295 U. S. 602, is to the contrary; both dealt with the power of Congress to limit executive removals. Indeed, the Court in the *Myers* case specifically denied to Congress, or to either branch of it, the power to remove.

Nor does Congress possess even a restricted power of removal of "employees" as asserted by some of the House proponents of Section 304. The identity of the source of

Congressional power over "officers" and "non-officers" compels the conclusion that the same identity exists with respect to the claimed power of removal—it does not exist in either case. Moreover, the diverse nature of the positions which are held by "officers" leads to such strange boundaries for the asserted power that it confirms the conclusion that Congress possesses no such power. Alternatively, respondents here are, in any event, "officers", not "employees". As to respondent Lovett, there can be no question; and as to the other two respondents, the same conclusion is indicated by the present organization of the executive branch. Finally, there is nothing in the nature of the Federal Communications Commission, in which respondents Watson and Dodd were employed, which in any way requires or permits any different conclusion.

Since, therefore, Congress does not possess a power of direct removal of respondents, Congress may not exercise a power of removal otherwise denied to it by a misuse of the appropriating power. That power, like all others held by Congress, is subject to constitutional limitations. *United States* v. *Butler*, 297 U. S. 1. And by Section 304 Congress has attempted to exceed those constitutional limitations. The power to remove a man from his position is tantamount to the power to control the manner in which the affairs of that position will be exercised, and that, if it be possible, spells the end of independent executive and judicial departments. *State* ex rel. *Tolerton* v. *Gordon*, 236 Mo. 142, 139 S. W. 403.

The conditional nature of this rider does not change the result. No matter how conditioned, the rider purports to exercise a power to remove that Congress does not possess. The condition is no more than the manner in which Congress has chosen to frame the assertion of power; if it does not have the power at all, any conditions that may be annexed are irrelevant. Certainly the Senate approval requirement does not make the rider equivalent to impeachment.

III

The second constitutional objection to Section 304 is that it is a bill of attainder within the prohibition of Article I, Section 9, clause 3 of the Constitution. Such bills were, in 1789, viewed with abhorrence as wholly unworthy of a free government, and no voice was raised in protest at their categorical prohibition by the Constitution. The need for liberal interpretation of the constitutional inhibition is apparent. Actually, however, this rider meets all of the tests laid down in the two classic cases in our law, *Cummings v. Missouri*, 4 Wall. 277, and Ex parte *Garland*, 4 Wall. 333. When we consider its substance, Section 304 is "a legislative act which inflicts punishment without a judicial trial", as it is defined in the *Cummings* case, and meets not only the tests enunciated by the majority in that case, but those laid down by the minority, as well. No one can doubt that Section 304 is "a legislative act which inflicts punishment"; indeed, the punishment which it assesses—permanent disqualification from office—is the same as the extreme punishment permitted upon conviction after impeachment, or upon judicial conviction of a few serious crimes. No one can doubt, again, that respondents were found guilty "without a judicial trial"; even an impeachment trial is not that, and the safeguards and limitations of an impeachment trial were conspicuous, here, by their absence. Section 304 exhibits, in fact, all of the characteristics of bills of attainder, and must be condemned on that ground alone.

IV

The third constitutional objection to Section 304 is that it denies to respondents the safeguards and rights guaranteed to them by the Fifth Amendment. The objection is on both the substantive and procedural levels.

Substantively, the Fifth Amendment guarantees that no particular person should be arbitrarily singled out for legislative action. *Cf. Hurtado v. California*, 110 U. S. 516, 535. Here, the rider sets up no class of persons, it enacts

no general law applicable to all who fall within its ambit, and it lays down no standards or rules. It is simply special legislation punishing these respondents, and no one else. Procedurally, the rider is likewise objectionable. Methods which may be appropriate when Congress is creating legislation fall far short of due process when Congress purports to exercise judicial magistracy. In the notice of hearing, in the practical—and in the case of Dodd the actual denial of opportunity to respondents to acquaint themselves with the charges against them, in the secret hearings, in the failure to advise respondents—or even Congress—of much of the evidence, or the identity of their accusers, in the failure to report evidence favorable to respondents, and in the manner in which Congress itself acted upon the reports of the Kerr Committee—in all of these respects, the manner in which respondents were convicted denied them even elementary due process. Again, Section 304 must stand condemned.

ARGUMENT.

Section 304, whatever else it may be, is an innovation. There is no precedent for it, so far as we know, in our history under the Constitution.

The question whether Section 304 is consistent with constitutional limitations is obviously one of paramount importance. For that reason we have undertaken to deal fully with each of the issues. Even when the ultimate answer is clear, as we believe it is in this case, a constitutional issue of this magnitude demands a comprehensive presentation.

Nor do we imply, because we assert three bases of invalidity, that any one alone would be inadequate. We believe, first, that Section 304 is unconstitutional because, in permanently removing these respondents from Government employment, it constitutes an improper interference with a coordinate branch of the Government. We believe, second, that Section 304 is unconstitutional because it is a bill of

attainder. Third, we believe Section 304 is unconstitutional because it denies to respondents due process of law. On any one of these bases, Section 304 must fall.

The minority "opinion of the court" below, however, raises one further issue: Whether disposition of the instant cases requires a decision of the constitutional questions. We believe, of course, that it does. We will proceed, first, to that issue, and then discuss the constitutional points in the order mentioned above.

I

The Sole Issue in the Instant Case is the Constitutional Validity of Section 304.

The court below was unanimous in holding respondents entitled to full recovery of the amounts claimed. The opinion of Chief Justice Whaley, however, concurred in by Judge Littleton (R. 33-41), concludes that in reaching that decision "it is immaterial whether Section 304 * * * or any part thereof, is constitutional or not" (R. 41). Examination of the opinion indicates that the basis for that decision was the preliminary conclusion that there was "no rational basis for construing the Act [Section 304] otherwise than as a mere stoppage of disbursing routine, nothing more", and that "the obligation was undisturbed" (R. 40). Although the reasoning of Chief Justice Whaley results in a full recovery by each respondent, we believe, with the Department of Justice (Pet., pp. 8-14) and Special Counsel for Congress (Memorandum, p. 7), and with the other Judges of the Court of Claims, that Chief Justice Whaley and Judge Littleton were clearly in error in so construing Section 304.

A. THE PURPOSE OF SECTION 304 AND ITS NECESSARY EFFECT, IF VALID, WERE TO REMOVE RESPONDENTS FROM OFFICE.

The touchstone for the construction of Section 304 is, of course, the intention of Congress, expressed in the language of the statute, its legislative history, and its obvious purpose and effect. "The policy as well as the letter of the law is a guide to decision." *Markham* v. *Cabell*, No. 76, decided December 10, 1945. See also *United States* v. *Dickerson*, 310 U. S. 554; *United States* v. *Valte*, 233 U. S. 509; *Dunwoody* v. *United States*, 143 U. S. 578; *United States* v. *Langston*, 118 U. S. 389; *United States* v. *Mitchell*, 109 U. S. 146; *National Labor Relations Board* v. *Thompson Products, Inc.*, 141 F. (2d) 794 (C. C. A. 9th). Those indicia make it clear beyond peradventure that Congress did not merely direct a "stoppage of disbursing routine", but intended to remove respondents from their offices by destroying the substantive obligations to pay them for their services.

1. *The Language of Section 304.*—Though cast in terms of a denial of appropriation, Section 304 is, on its face, far more than that. It is not the simple limitation of particular funds to a particular purpose, or even of funds already appropriated in other acts. The ban is permanent—no appropriation "which is now, or which is hereafter made available under or pursuant to any other Act" may be used to pay respondents any compensation for personal services. This is true not only of appropriations to the departments of the government in which respondents were then employed, but also of any appropriation "to any department, agency or instrumentality of the United States". Such language is certainly inconsistent with a simple desire to effect a "stoppage of disbursing routine"; it indicates plainly that the real purpose of the section is to remove respondents permanently from office.

Again, Section 304, by its terms, provides a procedure by which respondents could be appointed to their positions so as to entitle them to compensation—appointment by the

President by and with the advice and consent of the Senate prior to November 15, 1943. Unless respondents were being removed from their offices, that provision appears to be wholly superfluous, and again inconsistent in every way with a mere "stoppage of disbursing routine".

2. *The Legislative History of Section 304.*—When we turn, however, from the terms of Section 304 to its legislative history, any possible doubts which might remain are effectively destroyed. That history reveals beyond question that the purpose, indeed the sole purpose, of Section 304 was to remove respondents from office.

When the House of Representatives had reached its dilemma on Mr. Pickens (see p. 12, *supra*), Mr. Cannon, the Chairman of the Committee on Appropriations resolved the problem by promising the introduction of a resolution which would provide a sub-committee to hear the charges against each individual. Under that resolution, he promised, the subcommittee would "if the charges are sustained, take *immediate action to see that he is promptly separated from the public payroll*" (*Cong. Rec.*, Vol. 89, p. 710. Italics supplied).[8]

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[8] The purpose for which Section 304 was designed had, indeed, become manifest even earlier. Mr. Dies' original speech on February 1, 1943, had concluded (*Cong. Rec.*, Vol. 89, p. 486):

> • • • I submit it is now in order that the Committee on Appropriations take immediate and vigorous steps *to eliminate these people from public office.* (Italics supplied).

Mr. Hendricks, who first attempted to implement Mr. Dies' suggestion by a somewhat less sweeping rider, also made clear his intent to affect the employment of the 39 individuals (see pp. 11-12, *supra*). He said (*id.* p. 646):

> If the Treasury Department and the Post Office Department each has the right to hire anyone under this bill, *then we have the right to put in the names of people in this bill that they cannot hire.* (Italics supplied).

And Mr. Hoffman, defending the Hendricks rider, was even more specific. He stated (*id.* p. 698):

The immediate sponsor of H. Res. 105 was Mr. Sabath. In introducing it on February 9, he stated (*id.* p. 735):

> I have the utmost confidence in the chairman and the members of the great Committee on Appropriations and that they will make a fair and impartial investigation, and that if there is anything against any of these men they will refuse to appropriate for their salaries *and force their separation from the service.* (Italics supplied.)[58]

Indeed, H. Res. 105 itself authorized and directed the Kerr Committee to examine charges "that certain persons in the employ of the several executive departments and other executive agencies are unfit *to continue in such employment*" (italics supplied).

The Kerr Committee has left no doubt of the effect which it expected would follow its trials and its judgments. In its first report to the Committee on Appropriations, the Kerr Committee stated (H. Rep. No. 448, *supra*, p. 4):

> Your committee has dealt with the investigation directed under the House resolution as in the nature of an inquest of office, *with the aim to make such recommendations as may be justified, toward purging the public service of ungone[sic] guilty* . . . (Italics supplied.)

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* * * Those advancing the argument forgot that *Congress was not sitting as a trial court, but as an employer.*

* * * *Certainly the Congress, which appropriates the money for the jobs, has the right to say who shall hold those jobs* or if it desires to abolish the jobs. We may even end the agency in which they are employed.

* * * * *

We were not sitting here then, and we will not be sitting here today when we come to this amendment in such capacity [as trial judge]. *We are here as a hiring and a firing agency. We appropriate the money, and we have a right to say who we want on the payroll.* (Italics supplied.)

[58] See also the further remarks of Mr. Cannon after H. Res. 105 had been introduced. *Id.* pp. 740-741.

The same report, in passing judgment of "guilty" upon respondents Watson and Dodd, stated that the Committee found each "unfit for the present *to continue in Government employment*" (*id.* pp. 6, 7; italics supplied). The same finding was later made for respondent Lovett—that he was "unfit *to continue in the employment* of the United States Government" (*id.* p. 12; italics supplied).

The report of the Committee on Appropriations, which proposed Section 304, also made its purpose clear. That report (*id.* pp. 1-2), after approving the finding of the Kerr Committee that the respondents were "unfit to continue in Government employment", and noting that H. Res. 105 gave the Committee on Appropriations authority to introduce any implementing legislation, offered Section 304 for that purpose. The Committee could not have said more plainly that Section 304 was intended to ensure that respondents did not "continue in Government employment".

Finally, we may refer briefly to the debates on Section 304, particularly in the House. Mr. Kerr, in defending Section 304 on May 18, stated (*Cong. Rec.*, Vol. 89, p. 4582):

> I may say that the committee fully understood the seriousness of this matter. *It understands how serious it is to remove a man from his office* and understands that a stigma may be placed upon him when that act is done. I think the committee fully understands the implications involved in one branch of the Government in attempting *to remove an employee of another branch*. Those things we took into consideration and those things we attempted to handle justly and properly in the light of the evidence in this matter. (Italics supplied.)

Chairman Cannon, of the Committee on Appropriations, was most explicit in urging the approval of the final conference report (*id.* pp. 7127-7128):

> So let us be practical for a minute. *The House seeks the dismissal of these three men. How can that ob-*

jective be accomplished? Not by defeating this report. That would leave them in office.

If you reject this conference report, they retain their jobs undisturbed.

But if you agree to this conference report you adopt a plan under which these men will be removed from office before the 15th of next November unless appointed by the President and confirmed by the Senate.

You may take your choice. I know the alternative is not exactly to our liking, but we face a situation—do you want to take them out or do you want to leave them in. *If you reject this report, you leave them in, and if you agree to it, you adopt the only available method of removing them.* (Italics supplied.)

Finally, the Court should note that in adopting H. Res. 105, the House of Representatives contemplated that legislation introduced by the Kerr Committee pursuant to the Resolution would have the effect of "changing existing law", within the meaning of House Rule XXI, Clause 2, and could not, therefore, be made part of an appropriation bill. Consequently, H. Res. 105 specifically provided an exemption from that requirement. This exemption is specifically adverted to by the Committee on Appropriations in its report on Section 304 (H. Rep. No. 448, *supra*, p. 2). There could scarcely be stronger evidence that Section 304 was not intended solely as a limitation on the administrative action of the disbursing officers.

3. *The Necessary Effect of Section 304.*—That the effect of Section 304, if it be valid, is necessarily to effectuate respondents' discharge can be further demonstrated by reference to the long-standing general statutory prohibition against the acceptance of voluntary services. Rev. Stat. Sec. 3679, as amended (34 Stat. 48, U. S. C., Title 31, Sec. 665). Section 3679 provides that no department or officer of the Government shall "accept voluntary service for the Government". The Attorney General has ruled that this provision is generally applicable except where the statutes do not require even a minimum salary. 30 Op. Atty. Gen.

51. Respondents all held positions to which Congress had by law attached compensation.[9]

Thus Section 304 provides that respondents shall not, after a certain date, receive any compensation from the United States Government; Section 3679 of the Revised Statutes provides that voluntary services in the positions which respondents then held could not be accepted. The inescapable effect of the enactment of Section 304, if valid, is thus to remove respondents from their offices—an effect which the legislative history of the provision discussed above, shows that Congress plainly intended.

If Section 304 is not unconstitutional, therefore, respondents were legally removed from their offices on November 15, 1943, their services thereafter were those of volunteers and improper under Section 3679, and they are not entitled to recover in this action. If that Section is invalid, however, it could not affect respondents' tenure of their offices, nor the Government's obligation to pay the compensation fixed by law for those offices. They are, therefore, entitled to recover in this action.

B. IF SECTION 304 IS VALID IT DESTROYED ANY OBLIGATION TO PAY RESPONDENTS COMPENSATION AFTER NOVEMBER 15, 1943, EVEN IF IT DID NOT OPERATE TO REMOVE THEM FROM OFFICE.

Apart from whether Section 304 actually attempted a removal from office, which we think it plainly did; no support can be found for construing it, as Chief Justice Whaley and Judge Littleton did below, as intended only to stay the administrative "disbursing routine", and not in any way to disturb the Government's obligation to pay respondents' compensation. The effects which follow from such a construction of the statute make it seem absurd on its face.

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[9] *Lovett*, R. 19, and U. S. C., Title 5, Sec. 678a, 46 Stat. 1005; *Watson*, R. 24, and U. S. C., Title 47, Sec. 154(f)(1), 48 Stat. 1006, as amended; *Dodd*, R. 29-30, and U. S. C., Title 47, Sec. 154(f)(1), 48 Stat. 1006, as amended.

Congress must be assumed to have been familiar with the long line of decisions holding that the mere withholding of an appropriation would not, without more, affect an officer's or an employee's legal right to his salary, enforceable by suit in the Court of Claims. *United States* v. *Langston*, 118 U. S. 389; *United States* v. *Tutte*, 233 U. S. 509; and cases cited at R. 39. It seems hardly conceivable that Congress intended that the respondents would be unaffected by Section 304 except that they, alone *among all federal* employees, would collect their salaries not from the regular disbursing officer but through the medium of periodic suits in the Court of Claims. Yet, assuming its full validity, this is the limit of the effectiveness of Section 304 as construed by Chief Justice Whaley.

Furthermore, the intention to order disbursing officials of the Executive Branch of the Government not to perform their administrative duties of paying valid and legal salary obligations would indicate a degree of irresponsibility not lightly to be imputed to Congress. *Cf. Belknap* v. *United States*, 150 U. S. 588, 595; *Lynch* v. *United States*, 292 U. S. 571, 587. In addition, such arbitrary action would so plainly constitute an unwarranted and unconstitutional interference by the Legislative Department with the administrative functions of the Executive (see Point II, *infra*) that this construction of the Act should be adopted only for the most compelling and convincing reasons.

Actually, the present case is governed by *United States* v. *Dickerson*, 310 U. S. 554, which involved an appropriation act providing that "no part of any appropriation contained in this or any other Act for the fiscal year * * * shall be available for the payment" of any re-enlistment allowance for that year. This Court denied a recovery of a re-enlistment allowance, holding that the appropriation act provision effectually destroyed the substantive obligation to pay such allowances. The Court relied heavily upon the legislative history of the Act as showing that the intent of Congress was to destroy the substantive obligation and not merely to avoid making the necessary appropriation.

Chief Justice Whaley was wholly unsuccessful in distinguishing that case. The extent of his effort was to point to a slight difference in the mode of expression used in the two statutes; Section 304, instead of making appropriations "unavailable", as Congress had expressed it in the re-enlistment provisions, provides that no "available" appropriations "shall be used". This seems clearly to be a distinction without a difference. One simply cannot distill out of this slight dissimilarity in expression a basis for two radically different congressional intents—one a refusal to meet a valid obligation, and the other a refusal to permit an obligation to be created at all. Indeed, if one were to argue a distinction on any such basis, it would appear that the inferences are exactly contrary to those which Chief Justice Whaley assumes. It seems more likely that, as a matter of statutory construction, Congress is destroying a substantive obligation (or refusing to permit one to be created) when it limits the use of an *existing* appropriation, as with Section 304, than when it makes a contemporaneous appropriation unavailable.

Again, therefore, if the rider be valid, respondents, in these actions. If it is invalid, however, it was, as we have already stated, a nullity for all purposes. *Norton v. Shelby County*, 118 U. S. 425. It could not affect respondents' tenure of their offices, nor the Government's obligation to pay the compensation fixed by law for those offices, and respondents are entitled to recover in this action. Respondents are not estopped to assert their right to sue notwithstanding the fact that the amounts were not in fact paid when they became due. *United States v. Andrews*, 240 U. S. 90; *Glavey v. United States*, 182 U. S. 595. Nor is there any conflict between the respondents' position and the constitutional provision upon which *amicus curiae* relied so heavily in the court below—that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by law." These are not suits for specific performance of contracts to pay money. Respondents seek

in these cases, as in every other salary suit in the Court of Claims, only to establish the legal obligation of the United States to compensate them for their services.[10] Certainly this Court cannot assume, as *amicus curiae* argued in concluding their brief in the court below, that the Congress in existence at the time such a judgment is rendered would refuse to satisfy that judgment, and that consequently the case is moot.

It is submitted, therefore, that the question of the validity of Section 304 is squarely and necessarily presented in these suits, and that decision of this question cannot be avoided on any acceptable construction of its provisions. We proceed to the constitutional questions.

II

Section 304 Is Unconstitutional as an Improper Interference With the Executive Department.

The first fundamental objection to Section 304 is that it constitutes an invasion of the powers and responsibilities of the executive branch of the Government. By that section, Congress asserts a power to remove respondents permanently from Government employment. We believe that Congress has no such power, except pursuant to the impeachment procedure. Congress cannot use its power

[10] Indeed, if it be material, there *were* existing appropriations for both the Virgin Islands and the Federal Communications Commission in existing appropriation acts. Section 304 itself, stated that no "available" appropriation "should be used". But being wholly void and of no effect, the rider consequently did not limit those appropriations.

Actually, we can go one step farther: even if all of the funds for the Federal Communications Commission, for example, had been appropriated in the bill to which Section 304 were attached, the issue would be one of severability of provisions in accordance with the usual canons—would Congress intend that the entire appropriation should fail if a limitation upon it were held unconstitutional. Almost certainly, it would not. Here, where the rider is on a wholly different bill, the question is not even presented.

over appropriations as a device by which to distort or destroy the fundamental nature of our Government as one of three great independent branches.

The defenders of Section 304 in the House attempted to meet this objection on two grounds. Some argued that Congress, itself, was granted by the Constitution the power directly to remove individuals from Federal positions, and that in consequence there was no reason why Congress could not accomplish a removal by the less direct method of denying an individual his salary. Others, however, were willing to go further, and to contend that it was immaterial whether or not Congress had been granted by the Constitution a power to remove, since there were no constitutional limits on the power to appropriate.[11]

In order that both arguments may be fully answered, we deal with them separately. In Part A, *infra*, we will demonstrate that Congress has not been granted a power directly to remove the individual incumbents of Government positions—except, of course, by the impeachment process, and except, too, incumbents of positions in the legislative branch. In Part B, we will demonstrate that there *are* limits on the appropriating power, and that Congress may not use it to create for itself a power which is otherwise denied by the Constitution.

Preliminarily, it will be of assistance to restate in summary fashion the nature of Section 304. As we pointed out above (pp. 31-36), we think it plain that the purpose of Sec-

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[11] There is an inherent ambiguity in the phrase "a power to remove"; either it may mean a power granted to Congress by some provision of the Constitution other than the power to appropriate, or it may mean the power to effectuate a removal by the conditioning of an appropriation. We will attempt to avoid the ambiguity by the use of the phrase "*directly to remove*", in describing the argument that Congress could remove an incumbent by a direct statute, such as one stating "John Smith is hereby removed as Assistant Attorney General" or "Robert Morss Lovett is hereby removed as Executive Assistant to the Governor of the Virgin Islands."

tion 304 and, if valid, its necessary effect, were to remove respondents from office on November 15, 1943. The present constitutional objection to the rider does not, however, depend upon that construction; the question is equally presented if the provision be construed as only a permanent prohibition of the payment of any compensation for the personal services of those three individuals. That such Section 304, if it be valid, certainly did. In language presumably as sweeping as the Committee on Appropriations could devise, it prohibits the use of any present or future appropriation to pay compensation to any of the three respondents—except as jurors, or as members of the armed forces.[12]

Short of a direct ouster, there is no more effective way in which to consummate a man's permanent discharge than to deny him, permanently, any compensation for his work. Few individuals are in a position to continue for more than a very short time at work for which they will never receive compensation. The point was made with force in *State ex rel. Tolerton v. Gordon*, 236 Mo. 142, 139 S. W. 403, in which the Supreme Court of Missouri held invalid a similar attempt by the legislature to eliminate a state official by denying him compensation. The Court said (139 S.W. at pp. 408-409):

> By depriving relator of any compensation for the services which the game law demands he should render, his enforced removal from the office would be as effectually brought to pass as if ordered and enforced by a direct mandate of a court. It is not essential to the capture of a city or fort that it should be stormed or taken by force. The same result may be reached and with equal certainty by cutting off supplies by maintaining a successful blockade or siege. In the Merchant of Venice the leading character is made to

[12] The conditioning of this ban on an appointment by the President, and confirmation by the Senate, prior to November 15, 1943, had no effect, due to the belief by the President that Section 304 was invalid and his consequent refusal to acquiesce in it. See pp. 109-112, *infra*. The ban is now, therefore, permanent.

says: "You take my house when you do take the prop that doth sustain my house. You take my life when you do take the means by which I live."[13]

See also *State* ex rel. *Worrell* v. *Carr*, 129 Ind. 44, 53, 28 N. E. 88, 92; *People* ex rel. *Burbe* v. *Howland*, 155 N. Y. 270, 279, 49 N.E. 775, 778; *Cotten* v. *Ellis*, 52 N. C. 545, 548; *Reid* v. *Smoulter*, 128 Pa. St. 324, 336, 18 Atl. 445, 446. *Cf. Sleigh* v. *United States*, 9 C. Cl. 369.

Unquestionably, therefore, the purpose as well as the effect of Section 304, if it be valid, was to drive respondents out of the Government service, and permanently to keep them out. We turn, then to the first of the two grounds upon which the power of Congress thus to interfere with a coordinate branch of the Government was defended by its supporters in the House.

A. CONGRESS HAS NOT BEEN GRANTED A POWER DIRECTLY TO REMOVE THE INDIVIDUAL INCUMBENTS OF GOVERNMENT POSITIONS EXCEPT BY IMPEACHMENT AND EXCEPT AS TO POSITIONS IN THE LEGISLATIVE BRANCH.

Some of the members of the House who argued that Congress could directly remove individual incumbents from Government positions made no distinction as to the nature of the position involved. In their view, Congress was "a hiring and firing agency", and could, whenever it wished, remove the incumbents of practically any position in the Government. Others, however, limited their contention, and argued for a power directly to remove employees, but not

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[13] *Cf.* the statement of Hamilton in *The Federalist*, No. 79, speaking of the provision securing the compensation of judges: "In the general course of human nature, a *power over a man's subsistence amounts to a power over his will*" (italics in original). At an early period, the judges of Virginia remonstrated: "For vain would be the precautions of the founders of our government to secure liberty, if the legislature, though restrained from changing the tenure of judicial offices, are at liberty to compel a resignation by reducing salaries to a copper." *Cases of the Judges of the Court of Appeals*, 4 Call 135, 145 (Va. 1788).

officers. Mr. Keefe, a member of the Kerr Committee, may be taken as an example of the latter group. He stated (*Cong. Rec.*, Vol. 89, p. 4599):

> There are officers who are placed in office by and as the result of the enactment of legislation by the Congress creating those offices and fixing their tenure of office and fixing their salaries. As to these officials may I say that I would not contend for one moment that this Congress has the right to, in effect, remove them by refusing to appropriate money to pay their salaries. Congress has the undoubted right to abolish functions and agencies but not to in effect remove officials in this manner. But do not make that argument against this procedure where it merely involves a simple employee of the Government.

We shall answer both arguments, but adequately to answer Mr. Keefe's more limited contention requires that we first dispose of the more sweeping claim that Congress may directly remove any incumbent of practically any Government position.

Congress, of course, possesses only those powers specifically granted to it by the Constitution.[13a] If there be a power in Congress to remove the incumbents of Government positions in the executive and judicial branches, it must be granted to it by some clause in the Constitution. We believe that no such grant exists. Such a power would enable Congress to dominate the other coordinate branches of the Government. Indeed, the principle of the separation of powers is so basic to the question here in issue that a brief summary of it is warranted at the outset. With that principle in mind, we can then examine the constitutional allocation of powers between the legislative and the other departments.

[13a] Article I begins: "All legislative Powers *herein granted* shall be vested in a Congress * * *." (Italics supplied.)

1 THE SEPARATION OF POWERS PRINCIPLE CONDEMNS ANY INTERFERENCE BY ONE DEPARTMENT WITH EITHER OF THE OTHERS EXCEPT TO THE EXTENT SPECIFICALLY AUTHORIZED BY THE CONSTITUTION.

Whether or not Montesquieu had correctly analyzed the British Constitution, his argument that popular government could be secured only by the mutual independence of the three great branches of government was certainly the touchstone for the members of the Constitutional Convention. Montesquieu, *Esprit de Lois*, Bk. II, c. 6; see Gouverneur Morris (*Formation of the Union* (1927), H. Doc. No. 398, 69th Cong., 1st Sess., p. 393); Madison (*id.* pp. 397-398); James Wilson (*id.* pp. 846, 947); *The Federalist*, No. 47; *Kendall* v. *United States*, 12 Pet. 524, 610. The first three Articles of the Constitution, establishing, and granting powers to, the legislative, executive and judicial departments, are a direct reflection of his views. They had, of course, been given emphasis by the obvious weaknesses of the Articles of Confederation, in which substantially all powers had been commingled in a legislative branch.

No one doubts, now, that the "separation of powers" doctrine is not "merely a matter of convenience or of governmental mechanism", but rather is "basic and vital"—intended to preclude "a commingling of these essentially different powers of government in the same hands". *O'Donoghue* v. *United States*, 289 U. S. 516, 530. The principle not only confines each of the three great departments to its own sphere, but also demands that each maintain its separate independence, free from *control* or *coercion* by the others.

This necessity for reciprocal freedom from interference has been variously expressed, though never doubted, from our earliest history. James Madison, in *The Federalist* (No. 48) expressed it by stating that none of the departments "ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers". Justice James Wilson, another member of the Constitutional Convention, stated it even

more strongly—that the proceedings of each of the three departments "should be free from the remotest influence, direct or indirect, of either of the other two powers". *Works* (Andrews ed. 1896) Vol. I, p. 367. Mr. Justice Story adopted the language of Madison, quoted above. Story, *Commentaries on the Constitution* (5th ed. 1891), Sec. 530. But perhaps there is no better statement than that of the Supreme Court in *O'Donoghue* v. *United States*, *supra* (289 U. S. at 530):

> If it be important thus to separate the several departments of government and restrict them to the exercise of their appointed powers, it follows, as a logical corollary, equally important, that each department should be kept completely independent of the others—independent not in the sense that they shall not cooperate to the common end of carrying into effect the purposes of the Constitution, but in the sense that the acts of each shall never be controlled by, or subjected, directly or indirectly, to the coercive influence of either of the other departments.

See also *Humphrey's Executor* v. *United States*, 295 U. S. 602, 630; *Myers* v. *United States*, 272 U. S. 52, 116.

There are, of course, several instances in which the Constitution has itself worked a blend of the various powers by authorizing or requiring the participation of more than one department of the Government in certain functions. For example, as germane to the instant case, there is the specific provision for Senate participation in the appointing process, and the power of impeachment given to Congress by which it may remove individuals occupying executive or judicial positions. The principle of the separation of powers requires, however, that in such cases the Constitution should be expounded to blend the acts of the several branches no more than the Constitution expressly requires, and that a specific grant of power to participate in one manner excludes an intention to allow further participation in a different way or under different guises. *Meriwether*

v. *Garrett*, 102 U. S. 472, 515; *Kilbourn* v. *Thompson*, 103 U. S. 168, 190; *Mugler* v. *Kansas*, 123 U. S. 623, 663; *Myers* v. *United States*, 272 U. S. 52, 116; *Springer* v. *Philippine Islands*, 277 U. S. 189, 201-202. As the Court stated in *O'Donoghue* v. *United States*, *supra* (289 U. S. at 530), "Such exceptions serve rather to emphasize the generally inviolate character of the plan."

In the light of these principles we turn to the provisions of the Constitution.

2. THE LANGUAGE OF THE CONSTITUTION CLEARLY NEGATIVES ANY DIRECT CONGRESSIONAL POWER OF REMOVAL.

The Constitution contains several provisions which, in varying degrees, relate to the removal power. Fairly interpreted in the light of the principles just stated, they leave no doubt that Congress has only one power of removal of incumbents of positions in the executive and judicial branches—the impeachment process.

In Article I, Congress is given its specific removal power *provided* that it be done in a certain way. Article I, Section 2, clause 5, provides:

> The House of Representatives * * * shall have the sole Power of Impeachment.

And Section 3, clauses 6 and 7 of the same Article provide:

> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.
>
> Judgment in Cases of Impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any Office of Honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Finally, by the last clause of Section 8 of the same Article, Congress is given the power—

> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

By Article II, Section 1, clause 1, it is provided:

> The executive Power shall be vested in a President of the United States of America.

Section 2 of the same Article provides:

> The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.
>
> He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.
>
> The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3 of Article II provides, in part:

> • • • he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

And Section 4 provides:

> The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

a. The Impeachment Provisions, Which Are an Express Grant to Congress of a Direct Removal Power, Negative by Their Presence Any Other or Different Power of Direct Removal.

The only specific reference in the Constitution to a power of removal, in other words, are those relating to the process of impeachment. By that process, Congress is accorded a specific authority to inject itself into the affairs of the other two coordinate branches by removing their personnel from office. This power is unfettered by either the executive power of pardon (Article II, Section 2, clause 1) or the power of judicial review. *Ritter* v. *United States*, 84 C. Cl. 293, *certiorari denied* 300 U. S. 668. The exercise of this power of removal, however, is hedged about with various safeguards—the Senate trial, and the two thirds rule, for example. Under the principle above stated, this specific grant of power is in itself practically conclusive proof that there is no direct removal power vested in Congress. Certainly every principle of construction condemns a result which would either make the impeachment process a superfluity, or make the restrictions on its substance a nullity, or both—and allow Congress directly to remove persons from Government service in a manner which would deny to the individual the guarantees so carefully spelled out in the impeachment clauses. Yet under the argument which we are now considering, such would unquestionably be the result.

Perhaps it is unnecessary to elaborate the point, but it may be desirable to note that the Framers of the Constitution intended the impeachment process to be the sole means by which the legislative branch might remove the personnel of other departments. Other methods of removal by the legislative branch which were known to or suggested for adoption by the Constitutional Convention were voted down.

A proposal was made by John Dickinson, of Delaware, for removal of judges by joint address. As stated in Madison's Journal (Farrand, *Records of the Federal Convention of 1787* (1934), Vol. II, p. 428):

> Mr. Dickinson moved as an amendment to sect. 2—art. XI after the words "good behavior" the words "provided that they may be removed by the Executive on the application (by) the Senate and House of Representatives."

The proposal had precedent in England and in the Colonies. The Act of Settlement of 1701 (12 & 13 Wm. III. c. 2) had provided that judges could be removed not only by impeachment but also by joint address of both Houses of Parliament, and the Pennsylvania Constitution of 1776 had contained a similar provision (Thorpe, *Federal and State Constitutions* (1909) Vol. V, p. 3088). The Dickinson proposal, however, was defeated by a vote of 7 States to 1. Farrand, *supra*, Vol. II, p. 428.

The second method of removal, also suggested by Mr. Dickinson, provided that the following words be added to the section dealing with the Executive (Farrand, *supra*, Vol. I, p. 78):

> * * * to be removable by the national legislature upon a request by a majority of the legislatures of the individual states.

This proposal was also defeated by a decisive vote—9 States to 1 (*ibid.*).

The third method of removal of officers, which was well known to the Framers, was bills of attainder. See Point III,

infra. There was no disposition to question the absolute ban on such legislative actions (see pp. 114-115, *infra*).

Not only were the impeachment provisions intended to be the *sole* method of legislative removal, but it is also apparent that the Framers determined the scope of the impeachment power in the light of a full awareness that it was the sole means by which the legislative branch might remove executive or judicial personnel. Thus, Madison's Journal states (Farrand, *supra*, Vol. II, p. 550):

> The clause referring to the Senate, the trial of impeachment agst. the President for Treason & bribery, was taken up.
>
> Col. Mason. Why is the provision restrained to Treason & bribery only? Treason as defined in the Constitution will not reach many great and dangerous offenses. Hastings is not guilty of Treason. Attempts to subvert the Constitution may not be Treason as above defined—As bills of attainder which have saved the British Constitution are forbidden, it is the more necessary to extend the power of impeachments. He movd. to add after "bribery" "or maladministration." Mr. Gerry seconded him—
>
> Mr. Madison. So vague a term will be equivalent to a tenure during pleasure of the Senate.
>
> Mr. Govr. Morris, it will not be put in force & can do no harm—An election of every four years will prevent maladministration.
>
> Col. Mason withdrew "maladministration" & substitutes "other high crimes & Misdemeanors" (agst the State)

The conclusion that impeachment is the sole method of legislative removal is further reinforced by legislative precedents. In 1789, the First Congress engaged in an extensive debate on the President's removal power during the discussion of the bill establishing the Department of Foreign Affairs. We shall have occasion to refer to it in more detail below, pp. 69-70. During that debate, even those who objected to the prevailing view that the sole power of removal was in the President by constitutional grant agreed

that legislative removals were possible only by impeachment. Thus Mr. Lawrence, one of those who argued for a legislative power to vest the removal function in either the President or the President and Senate together (see p. 70, *infra*) cited the impeachment power as the ultimate legislative control. He stated (1 *Annals of Congress* 377):

> We can say he shall hold it for three years from his appointment, or during good behavior, and we may declare unfitness and incapacity causes of removal, and make the President alone judge of this case. We may authorize the President to remove him for any cause he thinks proper. It is in our power to make such declaration; but at the same time the Constitution provides, that the President shall not have it in his power to hold a person in office who has been guilty of crimes or misdemeanors against the Government; the power of removal in such cases is in the Legislature, by impeachment.

And Mr. Gerry, who believed that under the Constitution the President should share the removal power with the Senate, stated (*id.* p. 380):

> If there is a power of removal, besides that by impeachment, it must vest somewhere. It must vest in the President, or in the President and Senate, or in the President, Senate and House of Representatives. Now, there is no clause which expressly vests it in the President. I believe no gentleman contends it is in this House, because that would be that mingling of the Executive and Legislative powers gentlemen deprecate.

Mr. Gerry repeated the same argument later in the debates (*id.* at 501-502). See also Mr. Livermore (*id.* at 381); Mr. Boudinot (*id.* at 469); Mr. Lawrence (*id.* at 482).[14]

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[14] The only expression of the opinion that Congress could be a "hiring and firing agency" was expressed by Mr. Sedgwick. He stated (1 *Annals of Congress* 520-521): "The power of creating offices is given to the Legislature. Under this general grant, the Legislature have it under their supreme decision to determine the whole organization, to affix the tenure, and declare the control

Again, at the trial of the impeachment of Justice Chase, Luther Martin, who had been a delegate to the Convention, made it clear that he believed that impeachment was the *sole* means of legislative removals. He stated (14 *Annals of Congress* 436):

> I again repeat, that as the framers of the Constitution of the United States did not insert in their Constitution such a clause as is inserted in the Constitution of Pennsylvania, it is the strongest proof that they did not mean a judge or other officer should be displaced by an address of any portion of the legislature, but only according to the Constitutional provisions.

The same view was taken in 1837 by a Select Committee of the House Appointed to Inquire into the Condition of Executive Departments of the Government. On March 3, 1837, it reported (H. Rep. No. 494, 24th Cong., 2d Sess., pp. 2, 3):

> The power of the House to institute an inquiry of this kind into the conduct of the Executive, directly personal in its application, can nowhere exist, unless it be an incident of the "sole power of impeachment" which is given to the House of Representatives by the constitution. This power extends to the President, and all civil officers of the United States, on charges of treason, bribery, or other high crimes and misdemeanors. . . .
> It follows, therefore, that the only constitutional power under which the House of Representatives, as a co-ordinate branch of the Government, could constitute a committee to inquire into alleged "corrupt violations of duty" by another co-ordinate branch of the Government, (the Executive,) is the "power of impeachment."

This right of determining arises, not from express words, but by natural construction. So the Legislature may determine that an office may be held three, five, or seven years; to be removed by the President, the President and Senate, or the Legislature, or any other person whom they might introduce in office, merely for that particular purpose." See also 1 *id.* at 543. The vote was an express repudiation of his views; he voted in the minority. See 1 *id.* at 585. See *infra*, p. 70.

On at least two occasions, the view that direct legislative removals could be accomplished solely by impeachment has been confirmed by action of Congress. On March 21, 1867, the Committee on Public Expenditures of the House reported the following resolution (see *Cong. Globe*, 40th Cong., 1st Sess., p. 255):

> *Resolved*, That it is the sense of this House that Henry A. Smythe should be immediately removed from the Office of Collector of the Port of New York; and that the Clerk of the House cause a certified copy of this resolution to be laid before the President of the United States.

This resolution, it should be noted, did not purport to remove Mr. Smythe from his position; it went no further than a statement by the House that *the Executive branch* should remove him. Yet even this, the House believed, exceeded its powers; it could proceed *only* by impeachment. Mr. Butler of Massachusetts made this objection (*id.* p. 255):

> * * * we have one way in which to demand that an officer shall be removed, and that is by impeachment, and in no other way. * * * I have confidence in the House that we will speak the voice of the people in the only form known to the Constitution.

Mr. Randall of Pennsylvania made the same point (*id.* p. 256):

> It is not my purpose in any manner whatever to defend or palliate the conduct of Mr. Smythe. With that I have nothing to do. But as a member of this House I have a right to suggest that the House should not be placed in a wrong position upon this subject or upon any other. We have nothing whatever to do with the executive department of the Government. If this House thinks Collector Smythe has been guilty of malfeasance it is within its province to impeach him as far as is provided in the Constitution. But that this House should travel out of the line of custom or the path of duty and express an opinion upon the removal of an officer is a thing that, in my judgment, is entirely wrong.

And Mr. Eldridge of Wisconsin added (*id.*, pp. 282-283):

> I cannot vote for the resolution introduced by the gentleman from New York (Mr. Hulburd), because I look upon the appointment and removal of officers of the kind named as beyond the jurisdiction of Congress. It seems to me if we have a right to say this man ought to be removed, then certainly we have the right to name his successor and insist upon his appointment. I suggest to the gentleman from New York (Mr. Hulburd), before calling the previous question, that he modify his resolution so as to name the successor of Mr. Smythe. I suggest also that he name Horace Greeley for the place. He will then be able to accomplish by resolution his entire purpose, remove the incumbent and appoint such person as he may desire to hold office. I think there can be no doubt that we have the jurisdiction to do one as clearly as the other.

See also Mr. Chanler of New York (*id.* p. 283), and Mr. Bingham of Ohio (*id.* p. 335).

On March 22, 1867, an amendment was offered, which struck out all except the word "Resolved," and substituted (*id.* p. 282):

> That it is the sense of this House that Henry A. Smythe, collector of the Port of New York, ought to be impeached; and that the Committee on Public Expenditures proceed forthwith to prepare articles of impeachment.

Even this, however, was objected to, because no committee had then made an investigation to determine whether there was ground for articles of impeachment. The resolution was further amended, therefore, to refer the matter back to the Committee on Public Expenditures to make an investigation and, if they deemed guilt established, to prepare articles of impeachment, and this resolution was agreed to (*id.*, pp. 284-290). It does not appear that the Committee ever reported. See Hinds' *Precedents of the House of Representatives* (1907) Vol. III, Sec. 2501, pp. 1006-1007.

Beginning January 28, 1924, a similar resolution was considered in the Senate. The resolution, as modified on February 1, provided (*Cong. Rec.*, Vol. 65, p. 1782):

> *Resolved*, That it is the sense of the United States Senate that the President of the United States immediately request the resignation of Edwin Denby as Secretary of the Navy.

This resolution, too, like that of 60 years before, did not purport to remove the officer; again it was a recommendation that *the President* remove him. Although it was opopposed by many Senators on the ground that even a *recommendation* by the Senate was improper, it was finally passed on February 11 by a vote of 47 to 34 (*id.* p. 2245). During the course of the debate, however, many Senators made it clear that the sole means of legislative removal was by impeachment. Senator Borah of Idaho, for example, stated (*id.* pp. 2072, 2073):

> Mr. President, I shall be comparatively brief, I trust, in stating my position in regard to the pending resolution. I am unable to support it. * * * I am perfectly aware that just at this particular time, under the dreadful revealments which have been made and a very just aroused feeling which obtains throughout the country, the view which I entertain will not be regarded, perhaps, as coming up to the full measure of duty at this time. But I must be controlled by the plain fundamental provisions of our Constitution and depend upon time to justify my position. Permanent good and substantial results are only accomplished in matters like these by pursuing lawful and constitutional methods.
>
> * * * * * *
>
> But that is not all, Mr. President. In my opinion, *impeachment is the only way by which we can lawfully and constitutionally proceed in this matter.* It is the constitutional way; it is the effective way; it is the drastic way; and it is the way by which we can mete out the punishment for this offense if it has been committed, and in no other. (Italics supplied.)

And Senator Bruce of Maryland stated (*id.* p. 1982):

> I am opposed to this resolution because it invades a province of authority that belongs exclusively to the executive department of the Government. The Senate has no constitutional power to remove any public officer of the United States; it has no constitutional power to unite with the President in the removal of any such public officer; it has no constitutional power even to make any suggestion or recommendation looking to the removal of any such public officer.

See also the further remarks of Senator Borah, *id.* p. 2074. And see also Senator Norris of Nebraska (*id.* p. 1730); Senator Pepper of Pennsylvania (*id.* p. 1734); Senator Edge of New Jersey (*id.* pp. 1981-1982); Senator Glass of Virginia (*id.* pp. 2076-2077); and Senator Shortridge of California (*id.* p. 2169). No one, as far as appears from the debate, believed that the Senate, or Congress, could effect a direct removal of Secretary Denby in any other way. President Coolidge refused to accept the resolution, considering it an interference with Executive function. He said (*id.* p. 2335):

> The dismissal of an officer of the Government, such as is involved in this case, other than by impeachment, is exclusively an executive function. I regard this as a vital principle of our Government.

See also, to the same effect, the statement of President Cleveland quoted *infra* pp. 72-73.

b. The Specific Grant to the Executive of the Power to Appoint Is Itself Equivalent to a Grant of the Power to Remove.

Apart from the necessary inferences to be drawn from the impeachment provisions, the absence of a direct Congressional power of removal is further indicated by the specific grant to the executive department of the general appointive power. It has been long settled that, in the absence of specific provisions to the contrary, the power

of removal is an incident solely of the power of appointment. *Matter of Hennen*, 13 Pet. 230, 259-260; *United States* v. *Allred*, 155 U. S. 591, 594; *Keim* v. *United States*, 177 U. S. 290, 293, 294; *Reagan* v. *United States*, 182 U. S. 419, 424; *Shurtleff* v. *United States*, 189 U. S. 311, 314-315; *Burnap* v. *United States*, 252 U. S. 512, 515; *Wallace* v. *United States*, 257 U. S. 541, 544; *Myers* v. *United States*, 272 U. S. 52, 119; *Thwing* v. *United States*, 16 C. Cl. 13; *Howard* v. *United States*, 22 C. Cl. 305, 316; *Costello* v. *United States*, 51 C. Cl. 257, 264; In re *Eaves*, 39 Fed. 21 (C. C. W. D. N. Car.); 8 Op. Atty. Gen. 223, 232; *People* v. *Robb*, 126 N. Y. 180, 182, 27 N. E. 267; *Robertson* v. *Coughlin*, 196 Mass. 539, 542, 82 N. E. 678; Mechem, *Public Offices and Officers* (1890) Sec. 445; Goodnow, *Principles of Administrative Law* (1905) pp. 311-312. The principle is applicable equally as one of construction of constitutions as well as of statutes. See 1 *Annals of Congress* 376, 381, 491, 492.

The Supreme Court has had occasion to point out that this specific grant of the *appointment* power is, in view of this principle, equivalent to the specific grant of the *removal* power as well. In *Myers* v. *United States*, 272 U. S. 52, the Court stated (pp. 126-127):

> In the absence of any specific provision to the contrary, the power of appointment to executive offices carries with it, as a necessary incident, the power of removal. Whether the Senate must concur in the removal is aside from the point we now are considering. That point is, that by the specific constitutional provision for appointment of executive officers with its necessary incident of removal, the power of appointment and removal is clearly provided for by the Constitution, and the legislative power of Congress in respect to both is excluded save by the specific exception as to inferior offices in the clause that follows * * *[15]

[15] The "specific exception as to inferior offices" to which the Court refers, we will have occasion to deal with later (pp. 62-65).

It should be added that whether the Senate need or can concur in a removal is also aside from the point at issue in the present case. Suffice it here to point out that the Constitution itself indicates where the removal power is vested—and that it is *not* in Congress. See also *Matter of Hennen*, 13 Pet. 230, 260.

c. The Nature of the Grant of "the Executive Power" Indicates that the Power of Removal Was Granted to the Executive Branch.

The Constitutional grant of power to the executive department is broad, in contrast to the grant of power to the legislative branch. Article II begins: "*The executive Power* shall be vested in a President" (italics supplied). No attempt was made to specify the range of "the executive power" in the balance of Article II; the reference to particular executive powers was simply a strengthening and confirmation of the power where that was considered necessary and appropriate. *Myers* v. *United States*, *supra*, at p. 118.

In view of the proof afforded by the provisions relating to impeachments and appointments, there is no need to elaborate on the significance to be attached to this grant in this form. A few comments, however, are justifiable.

First, it seems likely from the experience with the Articles of Confederation that the grant of "the executive power" was intended by the Framers to accord to the executive the power to appoint and to remove. Under the Articles, there was no real executive branch; Congress, in common with most of the state legislatures, drew to itself largely all of the executive powers. It had the power to appoint to many positions (Article IX) and in accordance with the principle mentioned above that the power of removal is incident to the power of appointment, it also removed its appointees. See, *e. g.*, 4 *Journals of the Continental Congress* (Lib. of Cong. ed.) 361; 13 *id.* 32-33; 14 *id.* 542, 712, 714; 18 *id.* 1085, 1115.

When, therefore the Virginia Plan introduced by Randolph provided that the executive, under the Constitution, "ought to enjoy the executive rights vested in Congress by the Confederation" (Farrand, *supra*, Vol. I, p. 21), it seems likely that the grant was intended to include the power of removal, as well as that of appointment, both of which had previously been exercised by Congress. See *Myers* v. *United States*, *supra*, at p. 110. The Virginia Plan was the Constitution in embryo. Its subsequent history, and the great compromises by which the interests of the larger and smaller states were preserved, serve only to reinforce this inference. See *id.* at pp. 110-111.

This conclusion as to the intention of the Framers is strongly supported by the action of the First Congress in modifying the Northwest Ordinance of 1787 "so as to adapt the same to the * * * Constitution." Under the Ordinance, appointments and removals were by Congress, but in the Act of August 7, 1789 (1 Stat. 50, 53) the intention was clearly expressed that the executive powers theretofore exercised by Congress were to be transferred to the President, including the power of removal. The Act provided that all officers previously appointed by Congress were henceforth to be appointed by the President, by and with the advice and consent of the Senate, and that "in all cases where the United States in Congress assembled, might, by the said ordinance, revoke any commission or remove from any office, the President is hereby declared to have the same powers of revocation and removal."

Second, it is quite clear that in 1789, as now, the power of appointment and of removal of officers was considered an executive function. See, *e. g.*, *Murphy* v. *Webster*, 131 Mass. 482, 488; Re *Opinion of the Justices*, 300 Mass. 598, 14 N. E. (2d) 465. Of course, in the British government, the executive—the Crown—had the power of appointment of executive officers, and the power of removal incident to it (see *Myers* v. *United States*, *supra*, at p. 118), which may well have been influential. *Cf.* Ex parte *Grossman*, 267 U. S.

87, 108-111; Ex parte *William Wells*, 18 How. 307. But shortly after the adoption of the Constitution, during the debates in the First Congress in 1789 (see pp. 69-70, *infra*) there were expressions which can leave no doubt as to the views of the Framers. The group which ultimately prevailed in that great debate (see p. 70, *infra*)—the group led by James Madison—urged that the natural meaning of the term "executive power" included the right to appoint and to remove.[16] Madison himself stated (1 *Annals of Congress* 463):

> The question now resolves itself into this, Is the power of displacing, an Executive power? I conceive that if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, controlling those who execute the laws. If the Constitution had not qualified the power of the President in appointing to office, by associating the Senate with him in that business, would it not be clear that he would have the right, by virtue of his executive power, to make such appointments? Should we be authorized, in defiance of that clause of the Constitution,—"The Executive power shall be vested in a President,"—to unite the Senate with the President in the appointment to office? I conceive not. If it is admitted that we should not be authorized to do this, I think it may be disputed whether we have a right to associate them in removing such persons from office, the one power being as much of an executive nature as the other * * *.

The same view was expressed in the contemporaneous debate in the Senate. All of its proceedings then were executive (the Senate did not open its doors, except on one occasion, until 1794) but the remarks of Oliver Ellsworth,

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[16] This is not to say that only the executive may appoint; of course the legislative and judicial branches select and remove many of their own officers. See, *Matter of Hennen*, 13 Pet. 230; *United States* v. *Cooper*, 20 Dist. Col. 104, 124. We do not question that Congress may directly remove its own appointees, and no such issue is here involved.

later Chief Justice, were reported by Senator William Paterson (see Bancroft, *History of the Constitution of the United States* (1881) Vol. II, p. 192):

> * * * To turn a man out of office is an exercise neither of legislative nor of judicial power; it is like a tree growing upon land that has been granted.

And as Chief Justice Taft asked in the *Myers* case (272 U. S. at pp. 117-118):

> If such appointments and removals were not an exercise of the executive power, what were they? They certainly were not the exercise of legislative or judicial power in government as usually understood.

See also *Springer* v. *Philippine Islands*, 277 U. S. 189, 202; 4 Op. Atty. Gen. 603, 609-610.

Finally, it should be pointed out that this concept of the nature of executive power is strengthened by the provision enjoining upon the executive branch the duty to "take care that the Laws be faithfully executed" (Article II, Section 3). Though the executive power is granted in Article II, to the President, he must necessarily exercise it through subordinates; the Constitution contemplates that the executive shall function, not in a straight-jacket, but through such delegation as may be necessary. *Wilcox* v. *McConnel*, 13 Pet. 498, 513; *United States* v. *Eliason*, 16 Pet. 291, 302; *Williams* v. *United States*, 1 How. 290, 297; In re *Neagle*, 135 U. S. 1, 63; *Russell Co.* v. *United States*, 261 U. S. 514, 523. The necessary implication, of course, is that the executive should have the power to choose those who are to assist in the execution of the laws, and to remove those to whom the power should no longer be delegated. See Madison, 1 *Annals of Congress* 496, 497; Ames, 1 *id.* 474; *Myers* v. *United States*, *supra*, at p. 117.

d. The Congressional Power to "Vest" the Power of Appointment of Certain Officers Cannot be Construed as a Grant of a Removal Power.

In the light of these various factors, we come to the consideration of the two clauses by which, if by any at all, Congress might be said to have been granted a direct power of removal. It requires no lengthy analysis to show that in neither clause has this power been conferred upon the legislative branch.

The first clause which could be advanced as granting to Congress a general removal power is that contained in Article II, Section 2, clause 2 (*supra*, p. 47) by which it is provided that the general provision for appointment by the President by and with the advice and consent of the Senate is subject to the exception that—

> * * * the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

By its express terms, of course, this is a power to "vest" another power—to determine the *location* of the power of appointment and, by the same token, the location of the power to remove such officers. See Story, *Commentaries* (5th ed. 1891) Sec. 1537. The Framers recognized that in the case of inferior officers the procedure of Senate confirmation was unnecessarily cumbersome, and that even presidential appointment was not always necessary or appropriate. This provision was the obvious solution.

But it would indeed be extreme to distill an affirmative grant of a power to remove from the simple grant of power to *vest* the power to appoint. The clause does not even grant Congress the power to vest the power of appointment in itself, or in either of its branches. *United States* v. *Ferreira*, 13 How. 40; *Shoemaker* v. *United States*, 147 U. S. 282; Story, *supra*, Sec. 1535; Willoughby, *Constitutional Law* (2d ed. 1929) Vol. III, Sec. 991; 3 Op. Atty. Gen.

188; 12 *id.* 32, 37; 13 *id.* 7[illegible]. What it *can* do is to determine, within the executive branch, and as between the executive and judicial branches where the power to appoint and remove shall be placed; it *cannot* reserve it to itself.[17]

An analogy is supplied in Article III of the Constitution. By this Article, the judicial power of the United States is to be "vested" in the Supreme Court and in such inferior courts as Congress may from time to time establish. Under that Article, Congress has proceeded to establish inferior courts, and to "vest" them with such a quantum of the Federal judicial power as it deems appropriate. *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 234. Yet, no one would argue, from the power of Congress to control the *vesting* of judicial power, that Congress may itself exercise it. In Article III, as in Article II, the power granted to Congress is solely a power to "vest," not a power to delegate some of its own powers.

But it is unnecessary to elaborate the point, for the Court has specifically answered it. In *Myers* v. *United States*, *supra*, the Court considered this clause, and stated (p. 161):

> The power to remove inferior executive officers, like that to remove superior executive officers, is an incident of the power to appoint them, and is in its nature an executive power. The authority of Congress given by the excepting clause to vest the appointment of such inferior officers in the heads of departments carries with it authority incidentally to invest the heads of departments with power to remove. It has been the practice of Congress to do so, and this Court has recognized that power. The Court also has recognized in the *Perkins* case that Congress, in committing the appointments of such inferior officers to the heads of departments, may prescribe incidental regulations controlling

[17] The Constitution, of course, expressly grants to each House of Congress the power to select its own officers, and by the same token, to remove them. Article I; Section 2, clause 5; Section 3, clause 5.

and restricting the latter in the exercise of the power of removal. *But the Court never has held, nor reasonably could hold, although it is argued to the contrary on behalf of appellant, that the excepting clause enables Congress to draw to itself, or to either branch of it, the power to remove, or the right to participate in the exercise of that power. To do this would be to go beyond the words and implications of that clause and to infringe the constitutional principle of the separation of governmental powers.* (Italics supplied.)

The *Perkins* case (*United States* v. *Perkins*, 116 U. S. 483), to which Chief Justice Taft refers, was urged by the defenders of Section 304 in the House as authority for the power there claimed, but it is plain, from the above quotation, that it has no such force. In that case, as here, the issue was raised by a suit for salary. In allowing recovery to a cadet who had been removed by the Secretary of the Navy despite a statute which forbad dismissals in peace time except after court martial, the Court of Claims said (and its language was quoted and approved by this Court, 116 U. S. at p. 485):

> We have no doubt that when Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed.
>
> The head of a department has no constitutional prerogative of appointment to offices independently of the legislation of Congress, and by such legislation he must be governed, not only in making appointments but in all that is incident thereto.

There is no suggestion in the case, however—or in any other decision, for that matter—that this power to *limit* or *control* the removal power implies that any portion of it is vested in Congress, or in either of its branches. It is one thing to

control a power, and quite another affirmatively to exercise it, as the *Myers* case clearly points out.

But the extent to which Congress may act, in this respect, deserves somewhat more attention. Since its power under the excepting clause in Article II, Section 2, clause 2, and under the "necessary and proper" clause in Article I, Section 8, are identical, we may conveniently discuss them together.

c. The "Necessary and Proper" Clause Cannot be Construed as a Grant of a Removal Power.

This clause in Article I, Section 8, like that already referred to in Article II, is an affirmative grant of power to Congress. Under it, as under the other clause as construed in the *Perkins* case, *supra*, Congress undoubtedly has a very considerable power to determine many of the incidents of Federal employment. There is no warrant, however, for construing this clause as a grant to Congress of the direct power of removal.

The true basis for the interpretation of this clause has been nowhere better stated than by James Madison during the debates in the First Congress. He said, in discussing the allocation of powers made by the Constitution (1 *Annals of Congress* 581-582):

> The powers relative to officers are partly Legislative and partly Executive. The Legislature creates the office, defines the powers, limits its duration and annexes a compensation. This done, the Legislative power ceases. They ought to have nothing to do with designating the man to fill the office. That I conceive to be of an Executive nature. Although it be qualified in the Constitution, I would not extend or strain that qualification beyond the limits precisely fixed for it. We ought always to consider the Constitution with an eye to the principles upon which it was founded. In this point of view, we shall readily conclude that if the Legislature determines the powers, the honors, and emoluments of an office, we should be insecure if they

> were to designate the officer also. The nature of things restrains and confines the Legislative and Executive authorities in this respect; and hence it is that the Constitution stipulates for the independence of each branch of the Government.

Although Madison was thus delimiting the respective fields of the executive and the legislative branches with respect to the power of *appointment*, the same argument, obviously, applies to the power of removal, which is incident to the power to appoint. Indeed, at another point in the debate, Madison made his position on this clear. He answered what he had thought was an argument based on Article I, Section 8, as follows (1 *id.* 495-496):

> He seems to think (if I understand him rightly), that the power of displacing from office is subject to legislative discretion; because, it having a right to create, it may limit or modify as it thinks proper. I shall not say but at first view this doctrine may seem to have some plausability. But when I consider that the Constitution clearly intended to maintain a marked distinction between the Legislative, Executive, and Judicial powers of Government; and when I consider that if the Legislature has a power, such as is contended for, they may subject and transfer at discretion powers from one department of our Government to another; they may, on that principle, exclude the President altogether from exercising any authority in the removal of officers; they may give it to the Senate alone, or the President and Senate combined; they may vest it in the whole Congress; or they may reserve it to be exercised by this House. When I consider the consequences of this doctrine, and compare them with the true principles of the Constitution, I own that I cannot subscribe to it.

The legislative power extends, in other words, to a wide range of the incidents of offices or other positions within the sphere of federal employment. *Crenshaw* v. *United States*, 134 U. S. 99, 106. No one doubts that Congress could abolish an *office*—the office held by Dr. Lovett for example—or for that matter, the whole elaborate structure

of the Department of the Interior or the Federal Communications Commission. *Cf. Ware* v. *United States*, 4 Wall. 617. Congress could reduce the emolutions of an *office* by half or even to nothing—the equivalent of abolishing it. *Cf. Butler* v. *Pennsylvania*, 10 How. 402, 416. Congress may, likewise, determine the qualifications for an *office*, subject always to the limitation that it leave some scope for the exercise of the appointing power. *Myers* v. *United States, supra*, at p. 128; Willoughby, *supra*, Vol. III, Sec. 992; Corwin, *The President* (2d ed. rev. 1941) 70; 13 Op. Atty. Gen. 516, 520. And Congress, finally, as respects some positions, may impose limitations upon the power to remove an incumbent once duly appointed. *Humphrey's Executor* v. *United States, supra; Blake* v. *United States*, 103 U. S. 227; *Shurtleff* v. *United States*, 189 U. S. 311, 314; *Carr* v. *Gordon*, 82 Fed. 373 (C. C. N. D. Ill.); *Priddie* v. *Thompson*, 82 Fed. 186 (C. C. W. Va).[18]

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[18] The instant case in no way involves the issue decided in the *Myers* case as to the power of Congress to limit executive removals. For present purposes, it is unnecessary to determine whether limits may be imposed upon that power, or to assay the validity of the criticism of the wide sweep of the dicta in that case. See *e. g.*, Corwin, *Tenure of Office and the Removal Power Under the Constitution* (1927) 27 Col. L. Rev. 353 *et seq.* Professor Corwin himself acknowledged that his criticism of an *unlimited* power of removal did not mean that he believed that the power of removal was possessed by Congress itself. His article states (27 Col. L. Rev. p. 385):

> Thus, in consequence of the accidental circumstances that the location of the power of removal came up for decision at the very beginning of our constitutional system—*a power on all hands admitted not to belong to Congress, albeit Congress might, possibly, determine its location*—this power then and there became by the theory under discussion an independent limitation on Congress's power under the "necessary and proper clause" in the creation of offices. (Italics supplied.)

By the same token, we may accept the limitations on the executive power of removal which were imposed in *Humphrey's Executor* v. *United States*, 295 U. S. 602.

But there is no implication in any of these powers that Congress may step beyond the *office* to its *incumbent*, as Congress has done in Section 304. There can be no assertion that Section 304 changes the nature of the positions which respondents held, or the tenure or emoluments of those positions. That section dealt not with the office, but with the incumbent—the matter as to which Madison clearly stated Congress was not empowered to deal.

We submit, therefore, that a fair analysis of the Constitution can leave no doubt that Congress does not possess the power claimed for it by the most vigorous sponsors of Section 304—the general, direct power of removal. The matter is summed up by Chief Justice Taft in the *Myers* case—though he omits reference to the impeachment power, the strongest proof of our position (272 U. S. at p. 127):

> A reference of the whole power of removal to general legislation by Congress is quite out of keeping with the plan of government devised by the framers of the Constitution. It could never have been intended to leave to Congress unlimited discretion to vary fundamentally the operation of the great independent executive branch of government and thus most seriously to weaken it. It would be a delegation by the Convention to Congress of the function of defining the primary boundaries of another of the three great divisions of government. The inclusion of removals of executive officers in the executive power vested in the President by Article II, according to its usual definition, and the implication of his power of removal of such officers from the provision of section 2 expressly recognizing in him the power of their appointment, are a much more natural and appropriate source of the removing power.

B. THE PRACTICE FOR OVER 150 YEARS UNDER THE CONSTITUTION CONFIRMS THE FACT THAT CONGRESS WAS NOT GRANTED ANY GENERAL DIRECT REMOVAL POWER.

Perhaps the single most significant fact in the entire case is the fact that there is no counterpart of Section 304 in our history. Strange indeed it would be if Congress

possessed a power which had thus lain dormant for over 150 years. Much more likely is the usual presumption that a uniform course of practice under the Constitution is highly persuasive evidence of its true construction, particularly when it was affirmatively evidenced, as here (see pp. 50-52, *supra*) at a time when the Framers of the Constitution were actively participating in public affairs. *Stuart* v. *Laird*, 1 Cranch 299, 309; *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 351; *Cohens* v. *Virginia*, 6 Wheat. 264, 420; *Prigg* v. *Pennsylvania*, 16 Pet. 544, 621; *Cooley* v. *Board of Port Wardens*, 12 How. 299, 315; *Ames* v. *Kansas*, 111 U. S. 449, 463 *et seq.*; *The Laura*, 114 U. S. 411, 416; *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 297; *McPherson* v. *Blacker*, 146 U. S. 1, 28 *et seq.*; *Knowlton* v. *Moore*, 178 U. S. 41, 56; *Fairbank* v. *United States*, 181 U. S. 283, 308; Ex parte *Grossman*, 267 U. S. 87, 118; *Myers* v. *United States*, *supra*, at p. 175; *O'Donoghue* v. *United States*, 289 U. S. 516, 549-550.

The absence of any affirmative attempt to exercise such a power as is now claimed eliminates direct precedents. There are a few occasions, however, on which the power of removal has been fully discussed. They are significant largely in the negative evidence which they furnish; the failure on those occasions to assert the power now asserted is striking evidence that it does not in fact exist.

The great issue as to the removal power—the extent to which it could be *controlled* by Congress—furnished the occasions for most of the discussions, until it was settled by *Myers* v. *United States*, and *Humphreys's Executor* v. *United States*, *supra*. We have already referred to the discussion in the First Congress during the debate on the bill to create the department then known as the Department of Foreign Affairs. See *Parsons* v. *United States*, 167 U. S. 324, 328 *et seq.* As originally drafted, the bill implied that Congress was *granting* to the President a power to remove the Secretary; as amended in the House and passed by the Senate and signed by President Washington, any

such implication was removed. 1 Stat. 28. See 1 *Annals of Congress* 455, 578-585.

The debates in the House on the amendment, which extended over six days from June 16 to June 22, 1789, dealt fully with the subject of removals under the Constitution. They have been thoroughly analyzed, not only in the *Myers* case, but by the commentators on that decision. See especially Corwin, *supra*. Some of the statements there made, which declared that the impeachment power was the *sole* method of legislative removal, we have already quoted at pp. 50-51 above. The position which ultimately prevailed in that debate, however—that of Madison—denied even a power in Congress to *limit* the President's removal power, and only one person asserted that the power to create *offices* included the power to appoint and remove the *incumbents* of such offices. See footnote 14, pp 51-52, *supra*.[15]

The same issue arose again during the administration of President Jackson, precipitated by his removal of his Secretary of the Treasury, Mr. Duane, in a controversy over the United States Bank. The Senate resolution re-

[15] As analyzed by Prof. Corwin, the three major divisions of opinion were (1) those who believed the President had complete power of removal; (2) those who believed he shared it with the Senate; and (3) those who believed that the Constitution had not settled the question, and that Congress might vest the power by the "necessary and proper" clause. One or two members believed that removal could be only by impeachment. Mr. Sedgwick, the sole member who asserted a power in Congress directly to remove, was a minority member of the third group. The group led by Madison (the first stated above) prevailed, and its view was subsequently accepted as the correct construction. See Corwin, *op. cit. supra* note 18, at p. 361n; Story, *Commentaries* (5th ed. 1891), Sec. 1537-1544. There is no suggestion in any of the very scanty records of the contemporaneous Senate debate on the same bill, that any one in that body claimed that Congress, or the Senate, possessed a direct removal power. See John Adams, *Works* (1856 ed.) Vol. I, pp. 448-450; and Vol. III, pp. 408-412, which contains Adams' notes on the debate made while he was presiding in the Senate as Vice President.

questing information as to the causes for Duane's removal; was supported by Webster, Clay and Calhoun, who again asserted the power of Congress to limit the President's power to remove. Webster, for example, stated (11 *Cong. Deb.* 479):

> I think the Legislature possesses the power of regulating the condition, duration, qualification, and tenure of office, in all cases where the constitution has made no express provision on the subject.

See also Clay (*id.* at 513-524) and Calhoun (*id.* at 553-563). Again, however, there was no claim that Congress itself possessed a general removal power. Moreover, the Senate resolution was flatly rejected by President Jackson, who declared (Richardson, *Messages and Papers of the Presidents* (1909) Vol. III, p. 133):

> The President in case of this nature possesses the exclusive power of removal from office, and, under the sanctions of his official oath and of his liability to impeachment, he is bound to exercise it whenever the public welfare shall require it; if, on the other hand, from corrupt motives he abuses this power, he is exposed to the same responsibilities. On no principle known to our institutions can he be required to account for the manner in which he discharges this portion of his public duties, save only in the mode and under the forms prescribed by the Constitution.

The issue of the removal power again came to the fore in the administration of President Johnson, when the Tenure of Office Act was passed by the Reconstruction Congress. This Act, again, directly limited the President's removal power by requiring Senate approval of removals. The situation is stated in *Parsons v. United States*, 167 U. S. 324, 340:

> The President, as is well known, vetoed the tenure of office act, because he said it was unconstitutional in that it assumed to take away the power of removal constitutionally vested in the President of the United

> States—a power which had been uniformly exercised by the Executive Department of the Government from its foundation. Upon the return of the bill to Congress it was passed over the President's veto by both houses and became a law. The continued and uninterrupted practice of the Government from 1789 was thus broken in upon and changed by the passage of this act . . .

We need not trace the history of the Tenure of Office Act to the final verdict of unconstitutionality on its last remaining vestige in *Myers* v. *United States*, *supra*.[20] For present purposes, it is necessary only to state, again, that the power asserted by Congress in that Act was a power to limit and control executive removals: it was not the assertion of a legislative power to remove.

During the administration of President Cleveland, the issue as to the limits of the President's removal power was again raised by a request from the Senate that the President inform it of the reasons for certain removals. The President, in rejecting the request stated (Richardson, *Messages and Papers of the Presidents*, Vol. VIII, p. 379):

> I believe the power to remove or suspend such officials is vested in the President alone by the Constitution, which in express terms provides that "the executive power shall be vested in a President of the United States of America," and that "he shall take care that the laws be faithfully executed."
>
> The Senate belongs to the legislative branch of the Government. When the Constitution by express pro-

[20] The Act was finally repealed (except as to certain postmasters, of whom Myers was one) in the administration of President Cleveland, after the bitterness between the President and Congress which had led to its passage had been forgotten. Myers had been appointed by the President on July 21, 1917, to be a postmaster of the first class for a term of four years. After he had refused a demand that he resign, he was removed from office on February 2, 1920, by order of the Postmaster General, acting by direction of the President. In August, 1920, the President made a recess appointment of a successor. Myers sued to recover the salary for the balance of his term. His claim was denied by this Court.

> vision superadded to its legislative duties the right to advise and consent to appointments to office, and to sit as a court of impeachment, is conferred upon that body all the control and regulation of Executive action supposed to be necessary for the safety of the people; and this express and special grant of such extraordinary powers, not in any way related to or growing out of general Senatorial duties, and in itself a departure from the general plan of our Government, should be held, under a familiar maxim of construction, to exclude every other right of interference with Executive functions.

The decisions of the courts have, for the most part, considered the power of removal from the same aspect—the extent to which the executive power of removal may be limited by the legislature. In many cases, over a long period, this Court has considered this problem. Almost all of them are collected in *Myers* v. *United States*, *supra*. In none of them, however, so far as we are aware, has it even been argued that Congress has a general power of removal—save only in the *Myers* case, where it was expressly denied.[21] See pp. 63-64, *supra*. The *Myers* and *Humphrey's* cases, taken together, may be deemed to settle the question as to the limitations which Congress may impose on executive removals; but at the same time, they must also be taken to determine that no general removal power has been granted to Congress. In the *Humphrey's* case, a member of the Federal Trade Commission had been appointed in 1931 for a term of seven years. On October 7, 1933, the President

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[21] In *Wood* v. *United States*, 107 U. S. 414, the Court considered a statute which reduced the retirement pay of certain Army officers. The plaintiff's theory, *inter alia*, was that the act of Congress had in effect removed him from the office of major general and put him in that of colonel. Both the lower court and this Court clearly implied that Congress was without authority to effect such a removal, although his claim was rejected on the ground that the change was not in his office, but in his rank. The Court stated (p. 417): "Such rank not being an office, Congress could change his rank, and with it his pay."

following Humphrey's refusal to resign, undertook to remove him from office without assigning any of the reasons for removal specified in the statute. Suit was brought for salary due from October 8, 1933, to February 14, 1934, the date of Humphrey's death. Upon certificate from the Court of Claims, the Court held that the President's power of removal was limited to removals for statutory reasons, and allowed recovery. There is no hint in the opinion, however, that Congress itself has a direct removal power. Of the decision in the *Myers* case Mr. Justice Sutherland states (295 U. S. at pp. 627-628):

> The actual decision in the *Myers* case finds support in the theory that such an officer is merely one of the units in the executive department and, hence, inherently subject to the *exclusive* and illimitable power of removal by the Chief Executive, whose subordinate and aid he is. Putting aside *dicta* * * * the necessary reach of the decision goes far enough to include all purely executive officers. (Italics supplied.)

The *Humphrey's* decision is summed up in the following sentence (295 U. S. at p. 629):

> The authority of Congress, in creating quasi-legislative of quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime.

The same comment is applicable to the opinions of the Attorneys General. In the main, they, too, dealt with the same issue—the controllability of the executive removal power. Undeniably, however, the opinions implicitly deny a direct legislative removal power. See 4 Op. Atty. Gen. 1, 603, 610; 8 *id.* 223; 12 *id.* 32, 41, 421; 30 *id.* 79, 83. *Cf.* Willoughby, *supra*, Vol. III, Secs. 995, 999.

There remain to be mentioned the two exceptions of which we are aware to the above recitation. The first concerns

the Comptroller General. As originally passed by Congress in 1920, the bill creating this office provided that the incumbent could be removed only by impeachment or by concurrent resolution of both houses of Congress. The bill was vetoed by President Wilson, who stated (*Cong. Rec.*, Vol. 59, pp. 8609-8610):

> * * * It has, I think, always been the accepted construction of the Constitution that the power to appoint officers of this kind carries with it, as an incident, the power to remove. I am convinced that the Congress is without constitutional power to limit the appointing power and its incident, the power of removal derived from the Constitution.
>
> The section referred to not only forbids the Executive to remove these officers but undertakes to empower the Congress by a concurrent resolution, to remove an officer appointed by the President with the advice and consent of the Senate. I can find in the Constitution no warrant for the exercise of this power by the Congress. There is certainly no express authority conferred, and I am unable to see that authority for the exercise of this power is implied in any express grant of power. On the contrary, I think its exercise is clearly negatived by section 2 of Article II. That section, after providing that certain enumerated officers and all officers whose appointments are not otherwise provided for shall be appointed by the President, with the advice and consent of the Senate, provides that the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments. It would have been within the constitutional power of the Congress, in creating these offices, to have vested the power of appointment in the President alone, in the President with the advice and consent of the Senate, or even in the head of a department. Regarding as I do the power of removal from office as an essential incident to the appointing power, I can not escape the conclusion that the vesting of this power of removal in the Congress is unconstitutional and therefore I am unable to approve the bill.

The veto was sustained, but in the next Congress the bill, modified to provide for removal by impeachment or joint resolution, was passed and signed by President Harding. Act of June 10, 1921, 42 Stat. 26.

There may be warrant for rejecting the argument made by President Wilson—as applied to this particular office. The Comptroller General—recognized now as a quasi-legislative officer, the "watchdog" for Congress—is a lineal descendant of the British Comptroller and Auditor General "who holds his office during good behaviour, with a salary paid by statute directly out of the Consolidated Fund, and who considers himself in no sense a servant of the Treasury, but an officer responsible to the House of Commons." Lowell, *Government of England* (1908) Vol. I, p. 289.[22] As such, it may be consistent with the Constitution to provide for legislative removal. The Comptroller General, or his predecessors in the same type of office, have been regarded even since the days of Articles of Confederation as occupying a unique position. See Ordinance of September 26, 1778; Act of September 2, 1789, 1 Stat. 65; Act of March 3, 1817, 3 Stat. 366; Act of July 31, 1894, 28 Stat. 162, 205. Madison, in the First Congress in debating the Act of September 2, 1789, *supra*, himself recognized that the Comptroller's office exercised a peculiar blend of governmental powers, and was therefore properly subject to greater control by the legislative branch. See 1 *Annals of Congress* 611-612, 614. The same recognition is accorded him in an early opinion by Attorney General Wirt. 1 Op. Atty. Gen. 629. And see also Hamilton, *Works* (1904 ed.) Vol. VIII, p. 548; Taft, *Our Chief Magistrate and His Powers* (1916) pp. 81, 125-126.

No similar justification can be advanced for the other exception—the provision in Section 4(f) of the Tennessee Valley Authority Act providing for removal of members

[22] It was this practical argument which was emphasized by those who attempted, unsuccessfully, to override President Wilson's veto. See, *e. g.*, *Cong. Rec.*, Vol. 59, p. 8613.

of the Authority by concurrent resolution. Act of May 18, 1933, 48 Stat. 58; U. S. C., Title 16, Sec. 831c(f).[23] We venture to suggest that this provision is probably unconstitutional. It does not appear from the legislative history of the statute that any consideration whatever was given to Section 4(f) in the reports of either the Senate or the House, or in the debates upon the bill. Indeed, the origin of the provision, and the possible motivation for it, are completely obscure. See *Note*, 51 Harv. L. Rev. 1246; S. Rep. No. 23, 73d Cong., 1st Sess. (1933); H. Rep. No. 130, 73d Cong., 1st Sess. (1933). In *Morgan* v. *Tennessee Valley Authority*, 115 F. (2d) 990 (C. C. A. 6th), *certiorari denied*, 312 U. S. 701, a member of the T. V. A. who had been removed by the President brought suit, contending that Section 4(f) evidenced an intention of Congress that members could be removed *only* by Congress. The Court refused to construe the section as vesting in Congress the *sole* power of discretionary removals, since there was no clear attempt in the statute to negative the President's power. No more was necessary for the decision, but the Court added (115 F. (2d) at p. 993):

> Finally, it must be said that if § 4(f) is to be given the construction now urged for it, doubt exists as to its constitutional validity. Springer v. Philippine Islands, 277 U. S. 189; * * * Myers v. United States, supra. We are not required to resolve the doubt * * *.

We conclude, therefore, that there is no basis for the claim with which we have thus far dealt—that Congress was a "hiring and firing agency", and could remove the incumbent of practically any position in the Government whenever it wished to do so. There remains to consider whether Congress possesses a more limited direct power of

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[23] The act reads as follows: "* * * * *Provided*, That any member of said board may be removed from office at any time by a concurrent resolution of the Senate and the House of Representatives."

,removal, as suggested by Mr. Keefe, *supra* pp. 42-43, *i. e.*, a power directly to remove *employees*. To that we now turn. We believe it equally clear that Congress does not possess even that limited removal power, and that, in addition, it is immaterial here whether it does or does not because respondents are not employees in any event.

1. Congress does not possess even a restricted power of direct removal which would enable it to remove these respondents.

Mr. Keefe and others in the House asserted that even if Congress did not have a general direct removal power, it had at least a power directly to remove respondents, because, it was asserted, respondents were *employees*, not *officers*, of the United States. The contention has two answers: first, Congress has no more power directly to remove employees than it has to remove officers; and second, respondents are, in any event, officers and not employees.

a. Congress Possesses No Power Directly to Remove "Employees" as Distinguished from "Officers."

Neither Mr. Keefe nor anyone else in the House elaborated on this alleged distinction between officers and employees so far as a removal power of Congress is concerned. We are, therefore, unaware of the alleged basis for it. Moreover, we are frankly unaware of any basis which affords it the slightest support. Special counsel for Congress, in his *amicus* brief in the court below, did not advert to the distinction except to point out that, as respects employees, Congress may impose certain limits on the executive power of removal.

So far as the power of Congress is concerned, there is no doubt that the general source of the Constitutional power which Congress exercises in providing for the creation of "offices" and "non-offices" (for lack of a better term) is the same—the "necessary and proper" clause in Article I,

Section 8. There are a few offices which are created by the Constitution itself—the President, Vice President, Senators and Representatives, and the like—*but in all other cases* the offices owe their existence to legislation passed to implement the general grants of power over various subject-matters contained in Article I. In some instances, the statute may mention the office by name, or provide for a specific assignment of specific duties; in others, it may permit the same effect to be accomplished by executive or judicial allocation of functions. The extent to which Congress itself may be said to create offices and non-offices depends entirely on the extent to which it may wish to blueprint the administrative machinery, and may vary widely from time to time and statute to statute. And, of course, even where there has been no extensive legislative blueprinting, the annual appropriation acts afford Congress a considerable measure of *de facto* control over both offices and non-offices in the administrative set-up. See Macmahon, A. W., *Congressional Oversight of Administration: The Power of the Purse* (1943) 48 Pol. Sci. Quart. 161, 380.

But since the source of the power over "offices" and "non-offices" is identical, there is no basis for an argument that the Congress possesses a greater power of direct removal of "non-officers" than of "officers". Certainly Congress is possessed of full power to determine the emoluments of every Government position (subject to the minor constitutional exceptions), whether the position be an office or a non-office, and whether it be one created by a statute or by the statutory authority delegated to another person or agency. Similarly, the power of Congress to determine qualifications for the officer and for the employee are equal, as is its power to fix a tenure and impose limits and conditions on the power of removal of each. Nothing which Congress may do in either direction, as outlined in the *Myers* and *Humphrey's* cases, is dependent upon a distinction between officers and non-officers.

The powers of Congress with respect to the non-office *position* thus is no greater than its power with respect to the

office *position*. That being so, there is no reason to suppose that the power of Congress directly to remove the *incumbent* of one position is greater or less than its power to remove the incumbent of another position. The identity of Congressional power over officers and non-officers in every other respect compels the same identity as to the Congressional power of direct removal—it does not exist. It is fair to state that as to every item of proof that Congress does not have a general direct power of removal, the same item applies with equal or greater force to show that Congress does not have a limited power of direct removal over employees.[24] On the language of the Constitution, on authority, on precedent and on principle, Congress can have no more power to remove, for example, a minor employee of the Bureau of Labor Statistics than it has to remove the Secretary of Labor.

The absence of any basis for distinguishing between a power in Congress to remove officials and a power to remove employees is further illustrated by the diverse nature of the positions which are held by "officers". Article II, Section 2, clause 2 of the Constitution declares that the President shall, by and with the advice and consent of the Senate, appoint various particular officers—

> and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

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[24] It is possible that the power of Congress directly to remove non-officers is even more restricted than its power to remove officers. The Congressional power of impeachment extends to "civil officers" (Article II, Section 4). We need not determine, now, the extent to which that provision limits the impeachment power (see footnote 25a, page 81, *infra*), but to the extent that it prevents the impeachment of non-officers it indicates an intention on the part of the Framers that Congress should have nothing whatever to do with the direct removal of non-officer Government personnel.

Under this clause, it has uniformly been held that persons appointed by the President, the Courts of Law, or the Heads of Departments are "officers" of the United States. *United States* v. *Hartwell*, 6 Wall. (U. S.) 385, 393-394; *United States* v. *Mouat*, 124 U. S. 303, 307; *United States* v. *Smith*, 124 U. S. 525, 532; *McGrath* v. *United States*, 275 Fed. 294, 300 (C. C. A. 2d), *appeal dismissed* 260 U. S. 709; *Hoeppel* v. *United States*, 85 F. (2d) 237, 241 (App. D. C.); *Callahan* v. *United States*, 122 F. (2d) 216, 218 (App. D. C.). Conversely, persons not so appointed have been held to be not officers. *United States* v. *Germaine*, 99 U. S. 508.[25]

There is no doubt, of course, that the word as used in various statutes, and the word as used at various places in the Constitution, is not always to be accorded the same meaning. *Callahan* v. *United States*, *supra*; *Hendee* v. *United States*, 22 C. Cl. 134.[25a] Indeed, it is not clear that

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[25] If the argument be made that the word "officer" (even when called an "inferior" officer) connotes something more distinguished or important, it should be remembered that in 1789 the size of the Federal Government was very small. When the Government moved to the District of Columbia in 1801, the largest "Department" was the Treasury, and its total staff was less than 25 persons. In the debates in 1789, for example, Mr. Smith of South Carolina stated: "The inferior officers mentioned in the Constitution are clerks and other subordinate persons." (1 *Annals of Congress* 372.) See also Story, *op. cit. supra* note 19, at Sec. 1536.

[25a] A member of Congress, for example, seems to be not a civil "officer" under Article II, Section 4 relating to impeachments. 17 Op. Atty. Gen. 419; see also Blount's impeachment, July 1797 to January 1798 (Wharton, *State Trials* (1859) p. 200) apparently decided by reference to the specific provision in Art. VII, Sec. 3, empowering each house to determine qualification of its own members and also on the theory that to be a "civil officer of the United States" one must represent the nation as a whole. Nevertheless a member of Congress is an officer under a criminal statute against impersonation. *Lamar* v. *United States*, 241 U. S. 103. The authorities vary on whether a territorial judge is a "civil officer" under Article II, Section 4. Compare 3 Op. Atty. Gen. 409, 411, with 5 *id.* 288, 290-291, and *Reagan* v. *United States*, 182 U. S. 419, 424.

the word has the same meaning at every place in the Constitution; Article I, Section 3, clause 7, for example, which provides that the judgment in cases of impeachment may extend to "disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States", is obviously intended to have a broad application, broader than that intended in Article II, Section 2, clause 2 quoted above. Nor is it clear, in the present case, in exactly what context the word "officer" was used by the members of the House who urged the distinction between "officers" and "employees" as respects the alleged Congressional power of direct removal. Suffice it here to point out, however, that under the limited power of direct removal claimed for Congress which we are now considering, it could not remove, because they are "officers", a postal clerk (*Foshay* v. *United States*, 54 F. (2d) 668 (S. D. N. Y.)), or a mail carrier (*Waddle* v. *Hughes*, 260 Ky. 269, 84 S. W. (2d) 75)), or a penal guard (*Baskins* v. *United States*, 32 F. Supp. 518 (E. D. S. Car.) or an investigator of the Alcohol Tax Unit (*Brown* v. *Zerbst*, 99 F. (2d) 745 (C. C. A. 5th)) or any employee of the customs service (*Callahan* v. *United States*, 122 F. (2d) 216 (App. D. C.))—excluding, of course, those appointed before 1923 (*United States* v. *Smith*, 124 U. S. 525). Any argument which requires such results obviously cannot be accepted as a proper construction of the Constitution. The only possible conclusion is that no such alleged exception exists.

b. Respondents, in Any Event, Are Not "Employees."

The second, and alternative, answer to the claim that Congress may directly remove "employees" is that respondents, in any event, are "officers", and hence beyond the scope of the asserted power.

There can be no doubt whatever as to the validity of this answer so far as respondent Lovett is concerned. At the time that Section 304 was passed (*i. e.*, at the time that

the power of Congress to remove was asserted) he was the Government Secretary for the Virgin Islands, an office to which he was appointed by the President pursuant to Section 21 of the Organic Act of the Virgin Islands (Act of June 22, 1936, 49 Stat. 1807; 1812 U. S. C., Title 48, Sec. 1405t). And on November 15, 1943, when the inhibition of Section 304 became operative, he occupied the office of Executive Assistant to the Governor, having been appointed to that office by the Secretary of the Interior pursuant to Section 23 of the same Act (R. 19). In each position all of the requirements of an office were fulfilled. Appointment by the President or the Secretary of the Interior alone would be enough (see cases cited p. 81, *supra*) but in addition it is plain that in each office his position satisfied all of the requisites of an "office", as defined by the Supreme Court in *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 520:

> An office is a public station conferred by the appointment of government. The term embraces the idea of tenure, duration, emolument and duties fixed by law.

Dr. Lovett's positions had tenure and duration; as Government Secretary, presumably at the pleasure of the President, since no other tenure was specified, and as Executive Assistant pursuant to the provision that "The officers appointed by the Secretary of the Interior shall hold office during his pleasure." Both had emoluments. Both had duties fixed by law; the Act, in Section 21, specifies the duties of the Government Secretary, and Order No. 1870, issued by the Secretary of the Interior pursuant to Section 23 of the Act specifies the duties of the Executive Assistant. In each case, he took an oath of office (R. 19).

Although it is admittedly more doubtful, we submit that this alternative argument is also available to respondents Watson and Dodd. They were not, it is true, appointed by the Head of a Department, in the sense that those words are used, for example, in the opinion in *United States* v. *Germaine*, 99 U. S. 508. They were appointed by the Fed-

eral Communications Commission pursuant to the authority delegated in Section 4(f) of the Federal Communications Act of 1934 (Act of June 19, 1934, 48 Stat. 1067; U. S. C., Title 47, Sec. 154(f)) (R. 24, 49).

When the decision in *United States* v. *Germaine* was announced, in 1878, the executive branch of the government was then divided into seven so-called departments under which were grouped the various bureaus and offices. The first of the great independent establishments as we now have them—the Civil Service Commission—was not established until several years later. It was wholly proper in 1878 to state that the constitutional phrase "Heads of Departments" referred to the seven major branches, and also to hold that it did not refer to chiefs of bureaus or offices within those departments. *Cf. United States* v. *Germaine, supra; United States* v. *Mouat*, 124 U. S. 303. But it is quite a different matter to state that the independent establishments which now exist are not "Departments". As Mr. Justice Holmes said in *Towne* v. *Eisner*, 245 U. S. 418, 425:

> A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.

Certainly there is no magic requirement that the word "Department" itself be used in naming the establishment—an establishment does not have to be *called* a Department to be within the constitutional language. The Constitution deals with substance, not words. In 1933, the Attorney General held, for example, that the Civil Service Commission was a "Department" in the sense of the word as used in the Constitution (37 Op. Atty. Gen. 227), and that the three members who constitute the Commission are the "head of a department" in the same sense. In *Emergency Fleet Corp.* v. *Western Union Telegraph Co.*, 275 U. S. 415, 418, 426, the Supreme Court enumerated the various independent establishments then existing and termed them

"minor independent departments". See also 40 Op. Atty. Gen. Nos. 73, 74.

At the present time, therefore, we believe that it may be said to be proper to term the Federal Communications Commission a "department", and the seven members of the Commission the "head of a department", in the sense that the words are used in Article II, Section 2, clause 2, of the Constitution. We concede that in one case the contrary result has been reached. *United States* ex rel. *Crow* v. *Mitchell*, 89 F. (2d) 805, 808 (App. D. C.). If plaintiffs Watson and Dodd occupy positions which meet the other normal attributes of an "office", we submit that they, too, are "officers".

And it is plain that they do. Unquestionably, of course, the positions had tenure. Dr. Watson had been in the position of Chief of the Analysis Division, Foreign Broadcast Intelligence Service, since November 16, 1941 (R. 24); Mr. Dodd had been Assistant News Editor, Foreign Broadcast Intelligence Service, since December 22, 1942 (R. 29). Since the statute under which they were appointed prescribed no fixed term of years for their positions, they presumably held office at the will of the Commission. Certainly, however, they did not hold positions the temporary nature of which would prevent them from becoming an officer. *Cf.*, *United States* v. *Hartwell*, 73 U. S. 385; *United States* v. *Germaine*, 99 U. S. 508, 511; *Helvering* v. *Powers*, 293 U. S. 214, 224.

Unquestionably, too, the positions held by these plaintiffs had emoluments, fixed by the authority of the Commission (R. 24, 29). Moreover, they had fixed and specified duties, which were carefully and fully specified in their respective Civil Service Commission classification sheets. Each of them took an oath of office (R. 24, 29). They occupied positions, in other words, which in every respect comply with the charactgristics of "offices", as that term is usually known and commonly defined. See *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 520.

We submit, therefore, that this alternative answer to the assertion of the more limited power of Congressional removal is likewise available to respondents Watson and Dodd. Again, however, we should emphasize that this is but an *alternative* answer; the fundamental answer—that Congress possesses no such power—applies with full and equal effect to all three respondents.

c. The Nature of the Federal Communications Commission Does Not Afford Congress Any Power to Remove Its Personnel.

One further fact remains to be considered in connection with respondents Watson and Dodd, namely, the nature of the Federal Communications Commission itself as an agency possessing quasi-judicial and quasi-legislative powers. Although we believe that this fact is wholly irrelevant—indeed, it was not mentioned in the Congressional debate—we deem it wise to discuss it briefly.

In *Humphrey's Executor* v. *United States*, *supra*, the Supreme Court held that the "illimitable" power of removal of the executive over all purely executive officers, which it had affirmed in the *Myers* case, was not similarly "illimitable" in the case of a Federal Trade Commissioner. The Federal Trade Commission, the Court stated, was (295 U. S. at p. 628):

> * * * an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive.

The Interstate Commerce Commission seems likewise to have been regarded by the Supreme Court as being in the same category. See 295 U. S. 602, 629.

We may assume, for present purposes, that the principle applied in the *Humphrey's* case to a Commissioner of the

Federal Trade Commission would likewise apply to a Commissioner of the Federal Communications Commission. The Federal Communications Commission may be, and has been, requested by Congress under Section 4(k) to make reports in aid of legislation (U. S. C., Title 47, Sec. 154(k)).[27] It holds hearings and renders decisions on various matters of public interest, convenience, and necessity, some of which are enforceable and reviewable collaterally, and some by direct appeal to the Court of Appeals of the District of Columbia (U. S. C., Title 47, Secs. 401, 402).[28] And see *United States* ex rel. *Crow* v. *Mitchell*, 89 F. (2d) 805 (App. D. C.).

That assumption, however, does not indicate in any way that Congress possesses a power to remove a member of the Federal Trade Commission. The *Humphrey's* case, assuming its full applicability, established only that Congress had a power to *limit* and *control* the *executive power* of removal in the case of such agencies. The Court said, in summing up its conclusion (295 U. S. at p. 629):

> The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime.

The power of Congress here, in other words, is no greater than its power over inferior officers and other Government personnel; it may give to a position a certain degree of stability by limitations on and control over the executive

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[27] See, *e. g.*, Public Res. No. 8, 74th Cong., 49 Stat. 43, and the Report, H. Doc. No. 340, 76th Cong., 1st Sess. (1939).

[28] Indeed, there are many of the Interstate Commerce Commission procedures which have been made expressly applicable to the Federal Communications Commission. See, *e. g.*, Sec. 402(a), 48 Stat. 1093.

power of removal. But, just as in the case of such personnel, the power to deal with the office, and the power to deal with the incumbent, are necessarily wholly different matters. In the case of these minor independent departments of the Government, Congress has, simply, more power over the office than it has in the major departments; but in neither does its power extend to the incumbent of any position.

There is nothing strange or unusual in all this. The Federal Trade Commission, as the Supreme Court says in the *Humphrey's* case, exercises a combination of powers, both quasi-legislative and quasi-judicial. Congress may protect its members against interference by the executive through unrestricted removals, to the extent that it regards such protection as necessary and proper. The Commissioners are, of course, officers of the United States, being appointed by the President, by and with the advice and consent of the Senate, and they may be removed by Congress in the constitutional manner, by impeachment. Particularly to the extent that they exercise quasi-judicial functions, every reason which militates against an unrestrictable *executive* power of removal also militates with equal force against an unrestrictable legislative power of removal,[29] except, of course, by the impeachment process.

Hence, it is fair to conclude that even as to the Commissioners of the Federal Communications Commission, as to whom the *Humphrey's* case is presumably applicable, Congress has no power of removal. But in addition to that, it is fairly clear that respondents Watson and Dodd do not fall within the *Humphrey's* case at all; they are engaged solely in the performance of executive functions. As to them, the alleged Congressional power of removal is just as non-existent as it is for a postmaster.

Both of these plaintiffs were engaged in work for the Foreign Broadcast Intelligence Service, as the titles of

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[29] Legislative power of removal, if it existed at all, would of course be unrestrictable, since no matter what limitations were imposed, they could be removed by subsequent Congresses.

their positions shows (R. 24, 29). What is war work—analysis of foreign broadcast propaganda. The work of the Foreign Broadcast Intelligence Service (of which both were a part) was to analyze foreign "radio broadcasts emanating from foreign countries to determine the probable trends of the war and the internal morale and conditions of foreign nations." The contacts of the personnel so engaged were not with legislative or judicial bodies, but with executive agencies, such as the Office of Facts and Figures and the Coordinator of Information (both later merged in the Office of War Information), the Coordinator of Inter-American Affairs, the State Department, the Military and Naval Intelligence, Lend-Lease, the Department of Justice, and others. See *Seventh Annual Report, Federal Communications Commission* (1941) pp. 1-6.

Respondents Watson and Dodd, in other words, are in quite a different position from that occupied by Mr. Humphrey, or by the Commissioners of the Federal Communications Commission. The Federal Communications Commission certainly exercises, at least in these times and in these connections, executive powers, and these two respondents are engaged wholly in that phase of the Commission's work.

With respect to these two respondents, therefore, we submit that they must be considered as in no different position from Dr. Lovett, who is in an undeniably executive office in an undeniably executive department.

We believe that it is clear from the foregoing that Congress does not possess any power of direct removal, either broad or narrow in scope. We turn, then, to the last question—may Congress create for itself a power otherwise lacking by a misuse of its power to appropriate.

B. CONGRESS MAY NOT EXERCISE A POWER OF REMOVAL OTHERWISE DENIED IT BY A MISUSE OF THE APPROPRIATING POWER.

The most extreme position advanced by the supporters of Section 304 was that Congress may do *anything* it wishes in the way of appropriating or refusing to appropriate. This seems to have been the position of Special Counsel for Congress in the court below. Under this view, the proof thus far adduced under Part A, *supra*, pp. 42-89, is immaterial; Congress does not need a direct power of removal to be able to effect removals through appropriation measures. We believe that this position, too, is without foundation. The appropriation power of Congress *does* have constitutional limitations, and the limitations have patently been exceeded in this case.

1. THE POWER OF CONGRESS TO APPROPRIATE, LIKE ALL OTHER OF ITS POWERS, IS SUBJECT TO CONSTITUTIONAL LIMITATIONS.

The power of Congress to appropriate stems from Article 1, Section 8, clause 1 of the Constitution, which provides:

> The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; * * * [30]

There is no need now to revive the ancient debate over the meaning of the "general welfare" clause. After long controversy, its meaning was finally determined in *United States* v. *Butler*, 297 U. S. 1, and that decision has been accepted as conclusive. *Charles C. Steward Machine Co.* v. *Davis*, 301 U. S. 548, 587; *Helvering* v. *Davis*, 301 U. S. 619, 640. Under the *Butler* case, Congress may tax and spend

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[30] There is also the provision in Article I, Section 9, clause 7: "No Money shall be drawn from the Treasury, but in Consequence of Appropriation made by Law", and the provision in Article IV, Section 3, clause 2: "The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

for the "general welfare", and this latter phrase is not limited to the powers enumerated in Article I, Section 8. The views long advocated by Justice Story have been approved. Story, *supra*, Ch. XIV.

We do not contend, therefore, that the power of Congress to appropriate is limited to the very matters over which Congress has specific power to act. Congress may, and has, raised money by taxes, and appropriated it, for the relief of distress due to domestic and foreign catastrophes, for public health, for education, for the advancement of science and the arts, for social welfare, for industry and agriculture, and the like. No one can now deny that it may do so, or not do so, as it wishes.

On the other hand, there is nothing in this power to appropriate for "the general welfare" which in any degree indicates that appropriations may be made a device whereby the constitutional limits imposed upon Congress can be destroyed, or the government established by the Constitution be subverted, and made wholly subservient to the legislative branch. There is no simple rule to the effect that because Congress has a power specifically granted by the Constitution it may therefore exercise it without restraint. All of the powers which Congress has are powers which are delegated to it, yet all of these powers are granted subject to the limitations imposed by the Constitution. In *Linder* v. *United States*, 268 U. S. 5, the Court stated (p. 17):

> Congress can not, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within power reserved to the States, is invalid and cannot be enforced.

Similarly, in *McCulloch* v. *Maryland*, 4 Wheat. 317, Chief Justice Marshall stated (p. 423):

> * * * should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.

And in *Fairbank* v. *United States*, 181 U. S. 283, a federal stamp tax on foreign bills of lading was held unconstitutional as violating the constitutional prohibition against taxes on articles exported. The Court, referring to *Almy* v. *California*, 24 How. 169, holding a stamp tax by a State on bills of lading on gold shipped out of the State to be unconstitutional, said (p. 294):

> In other words, that decision affirms the great principle that what cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result.

Again, in *Pollock* v. *Farmer's Loan & Trust Co.*, 157 U. S. 429, the Court stated (p. 581):

> If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution. * * *. But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls, as has indeed been established by repeated decisions of this court.

In each of these cases, Congress was dealing with the power to tax—a power just as expressly granted as the power to appropriate. In each case, the Court made it clear that it could not and would not accept the principle that a granted power was limited only by the self-restraint of the legislature. The principle which the Court *has* accepted, and to which it has consistently adhered, is that laid down long ago in *McCulloch* v. *Maryland*, *supra*, at p. 421:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

But the point does not require further elaboration. No one can reasonably deny that all powers granted by the Constitution—whether to Congress, to the President, or to the courts—must be exercised in a way which, to use the language of Chief Justice Marshall, "consist with the letter and spirit of the constitution". The power to tax, for example, is a broad power—a power to tax "for the general welfare". The discretion of Congress with respect to the objects of taxation, the amount of taxation, the exemption from taxation, and all of the other incidents of tax laws is of the widest possible scope. No one can doubt that by tax laws Congress may influence many policies which it could not directly affect; and that the tax laws are nonetheless constitutional. *Cf., Veazie Bank* v. *Fenno;* 8 Wall. 533; *McCray* v. *United States,* 195 U. S. 27; *Magnano Co.* v. *Hamilton,* 292 U. S. 40. Similarly, the power of Congress over interstate and foreign commerce is broad and sweeping, and its exercise may affect many intrastate matters, yet the exercise of the power is nonetheless constitutional. *Cf., The Minnesota Rate Cases,* 230 U. S. 352; *Shreveport Rate Case,* 234 U. S. 342; *University of Illinois* v. *United States,* 289 U. S. 48.

Notwithstanding these sweeping grants of power, and notwithstanding the collateral consequences which may legitimately flow from their exercise, no one has seriously doubted that they have limits. The power to tax, for example, which is closely related to the power to appropriate (both of them granted by the same clause) has been restricted when it was believed that it was being used—misused—to regulate and control matters not within the scope of the powers of Congress. See, *e. g., Child Labor Tax Case;* 259 U. S. 20; *Hill* v. *Wallace,* 259 U. S. 44; *Linder* v. *United States,* 268

U. S. 5, 17; *United States* v. *Constantine*, 296 U. S. 287. *Cf. Nigro* v. *United States*, 276 U. S. 332, 353 (1928).[31] In these cases, Congress has declared that the taxing power may not be used to obliterate the States, in violation of the Tenth Amendment. And there can be no question that a tax which had the purpose and necessary effect of violating any other constitutional guarantee would likewise fail; certainly no one would consider valid a tax which violated the First Amendment by imposing rates on Episcopalians treble those imposed on others, for example.

The point was made by the Court in *Veazie Bank* v. *Fenno*, *supra*. After noting that the grant of the power to tax is in general, sweeping terms—indeed that "More comprehensive words could not have been used" (*id.* p. 540)—the Court continued (*id.* p. 541):

> There are, indeed, certain virtual limitations, arising from the principles of the Constitution itself. It would undoubtedly be an abuse of the power if so exercised as to impair the separate existence and independent self-government of the States, or if exercised for ends inconsistent with the limited grants of power in the Constitution.

The answer must likewise be the same when we are considering the power of appropriation. See *Gibbons* v. *Ogden*, 9 Wheat. 1, 199; Story, *supra*, Secs. 922, 978. Like the taxing power, it is wide in scope. The objects of appropriation, like the objects of taxation, are subject to the wide discretion of Congress. The amount to be appropriated, like the amount to be raised by a tax, is a matter with which Congress is peculiarly empowered to deal. Yet there is no more reason to suppose that the power to appropriate can be exercised without regard to constitutional limitation than that the power to tax may be so exercised.

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[31] In *Grosjean* v. *American Press Co.*, 297 U. S. 233, the Court likewise struck down a purported exercise of the state taxing power which it believed was designed to deny rights guaranteed by the First Amendment.

Each must always remain subject to the fundamental guarantees of the Constitution. *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, 313.

We do not mean, of course, that the motives and purposes of Congress can be searched out in every case and employed to invalidate an appropriation. If the appropriation, valid on its face, is calculated or even intended to accomplish moral, social, or economic ends, as well as to advance the general welfare, we fully agree that the courts cannot speculate on what induced Congress to select the particular object of appropriation, or its amount. *Cf. Pacific Fisheries* v. *Alaska*, 269 U. S. 269, 277; *Sonzinsky* v. *United States*, 300 U. S. 506. But when Congress inserts in an appropriation act a provision explainable only as the means to accomplish a forbidden end, we believe that Congress exceeds its powers, and that the courts may, indeed must, act. This is precisely what this Court decided as to another rider on another appropriation act in *United States* v. *Klein*, 13 Wall. 128. There Congress, though purporting to prescribe regulations as to the appellate jurisdiction of this Court in fact prescribed a rule of decision on certain cases. In declaring the rider unconstitutional the Court said (p. 145):

> But the language of the proviso plainly shows that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have.

As Mr. Justice Holmes said in *Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426, 434:

> But it has been held a great many times that the most absolute-seeming rights are qualified and in some circumstances become wrong. One of the most frequently recurring instances is when the so-called right is used as part of a scheme to accomplish a forbidden result.

The body of precedents dealing directly with the power of appropriation is not, of course, large. *Massachusetts* v. *Mellon*, 262 U. S. 447, and *Frothingham* v. *Mellon*, 262 U. S. 447, make judicial review of the appropriating power highly unlikely. However, in *United States* v. *Butler*, 297 U. S. 1, in which the Court regarded the tax and the appropriation as so inseparable as to enable a taxpayer to question the appropriation, the Supreme Court struck down the appropriation contained in the original Agricultural Adjustment Act because it was inconsistent with the Tenth Amendment. Unquestionably, in that case, Congress had exercised the power of appropriation. Yet since it did not, in the language of *McCulloch* v. *Maryland*, *supra*, "consist with the letter and spirit of the constitution", it was held bad. The Tenth Amendment, in other words, could not be avoided by the device of a conditional appropriation.

A few years earlier a similar problem was presented to Attorney General Mitchell. He stated (37 Op. Atty. Gen. 56, 61):

> This proviso cannot be sustained on the theory that it is a proper condition attached to an appropriation. Congress holds the purse strings, and it may grant or withhold appropriations as it chooses, and when making an appropriation may direct the purposes to which the appropriation shall be devoted and impose conditions in respect to its use, provided always that the conditions do not require operation of the Government in a way forbidden by the Constitution. Congress may not, by conditions attached to appropriations, provide for a discharge of the functions of Government in a manner not authorized by the Constitution. * * * It might make appropriations on condition that the executive department abrogate its functions. It might, for example, appropriate money for the War Department on condition that the direction of military operations should be conducted by some person designated by the Congress, thus requiring the President to abdicate his functions as Commander in Chief.

Mansfield, *The Comptroller General* (1939), p. 78, is to the same effect:

> It must be conceded at once that the sanction of withholding appropriations—an absolute power—might be used to secure an unconstitutional result. Should Congress, for example repeal existing laws on the subject and appropriate for the salaries of the President and the Supreme Court less than they have been receiving, they would have no legal means of getting their usual pay despite the plain mandate that their compensation "shall not be diminished." So also, if Congress made the appropriations for all governmental expenditures conditional upon the Comptroller General's prior approval of these, it is hard to see how payments could legally be made otherwise. But the absolute quality of the appropriating power does not extend—as against a challenge from the other two branches of government—beyond the sanction for its enforcement, the withholding of appropriations. The executive is at liberty to treat a condition as unconstitutional if it is prepared also to forego the appropriation to which it is attached; and the courts might conceivably go further, for they have claimed that separability is ultimately a judicial question.

These views are unquestionably correct. An absolutely unlimited power to appropriate, free from every restraint, could easily be used to destroy our whole system of government, and every guarantee of civil liberties which we have. The Court, in *United States* v. *Butler*, *supra*, cited another illustration. Agreeing that Congress could appropriate money in aid of education, the Court said (297 U. S. at p. 74):

> But an appropriation to an educational institution which by its terms is to become available only if the beneficiary enters into a contract to teach doctrines subversive of the Constitution is clearly bad. An affirmance of the authority of Congress so to condition the expenditure of an appropriation would tend to nullify all constitutional limitations upon legislative power.

Nor must we necessarily agree with the majority in the *Butler* case to reach this result. The dissenting opinion of Mr. Justice Stone, no less than the majority opinion of Mr. Justice Roberts, recognizes that the power to tax and spend are powers limited by the remainder of the Constitution. They disagreed on whether the nation-wide relief of agricultural distress was a matter properly within the scope of the "general welfare" clause. Mr. Justice Stone, dissenting, said (297 U. S. at p. 87):

> The power to tax and spend is not without constitutional restraints. One restriction is that the purpose must be truly national. Another is that it may not be used to coerce action left to state control.

And, had the issue in the case been one other than the Tenth Amendment, Mr. Justice Stone would undoubtedly have added that still another is that it may not be used to destroy the fundamental constitutional framework of our Government.

One further illustration may be made. In 1860 Congress, in providing for an appropriation to complete the Washington Aqueduct, prescribed that it should be expended under the supervision of Captain Meigs. In a special message to the House, President Buchanan stated (Richardson, *supra*, Vol. V, p. 598):

> I deemed it impossible that Congress could have intended to interfere with the clear right of the President to command the Army and to order its officers to any duty he might deem most expedient for the public interest. If they could withdraw an officer from the command of the President and select him for the performance of an executive duty, they might upon the same principle annex to an appropriation to carry on a war a condition requiring it not to be used for the defense of the country unless a particular person of its own selection should command the Army.

But the examples of what might be done under a power of Congress to appropriate free from all restraint are limited only by one's imagination. No money shall be used

to pay Secretary Wallace, or Mr. Justice Murphy, or Senator Barkley, or any person who voted for Dewey, or any Catholic.[32] No money shall be paid to any Supreme Court Justice unless the decision in *Smith* v. *Jones* is rendered in favor of Smith. No money shall be paid the State Department until Russian recognition is withdrawn. That is not to say that such measures are likely. We agree, with Mr. Justice Stone, that "Courts are not the only agency of government that must be assumed to have a capacity to govern". *United States* v. *Butler*, *supra*, at p. 87. What we do say, however, is that nothing in the Constitution, and nothing in our practice under it, can lead to the conclusion that if such acts as these were attempted, the courts would stand aside. On the contrary, as in every other case where the legislature, or the executive, has sought to exercise a granted power to achieve a forbidden result, the courts would, and should, strike them down.

2. Section 304 is an unconstitutional use of the appropriating power.

There finally remains to show, of course, that Section 304 is such a misuse of the appropriating power. We think unquestionably it is, because it is an assertion of the power to remove executive employees and to destroy the independence of the executive department.

No one can really doubt that the power to remove a man from his position is tantamount to the power to control the manner in which the affairs of that position will be exercised. We need go no further than the Constitution itself,

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[32] Article VI of the Constitution states: "* * * but no religious Test shall ever be required as a Qualification to any office or public Trust under the United States." Could it be argued that in the face of that provision (reenforced by the First Amendment) Congress could validly appropriate with a proviso that no part of the appropriation should be used to pay the salary of any Catholic?

and its provisions for life tenure of judges, to see that there has been no doubt of that principle since the earliest times in our history. Indeed, one of the plaints of the Declaration of Independence declared that the King had "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." See also, *The Federalist* (Hamilton) Nos. 78, 79; *Evans* v. *Gore*, 253 U. S. 245. But the same principle is equally applicable to non-judicial positions. In denying an unrestrained power in the President to remove a member of the Federal Trade Commission, the Court said in *Humphrey's Executor* v. *United States, supra*, at p. 629:

> For it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will.

And at a later point in the opinion (p. 630):

> The power of removal here claimed for the President falls within this principle, since its coercive influence threatens the independence of a commission * * *.

In the great debate of 1789 (pp. 69-70, *supra*), in which the removal power was in issue, Madison noted the same principle (1 *Annals of Congress* 581):

> * * * if there is a principle in our Constitution, indeed in any free Constitution, more sacred than another, it is that which separates the Legislative, Executive and Judicial powers. *If there is any point in which the separation of the Legislative and Executive powers ought to be maintained with great caution, it is that which relates to officers and offices.* (Italics supplied.)

If, therefore, we are to have a Government with three great and independent branches, it is impossible to accord to one of the branches an unrestrained power to remove the incumbents of the various positions in the coordinate branches beyond that envisaged by the impeachment provisions of the Constitution itself. The power here asserted

—the power so to appropriate as to effect removals from office—would make of the Congress the overwhelmingly dominant force, and would make of the executive and judicial branches mere appendages to the legislature. For there is no distinction possible, on principle or on any other basis, between the power to remove these plaintiffs, and the power to remove in a similar fashion the Secretary of State whose foreign policy fails to accord with the views of Congress, or a federal district judge in California, or the very member of the Federal Trade Commission whose independence was emphasized in the *Humphrey's* case.

No one doubts, of course, that Congress does possess a great power to determine the form of the Government, and the extent to which it will or will not exercise the powers committed to it by the Constitution. No one doubts that Congress may determine to a large extent the scope of executive and even judicial duties, and the instrumentalities by which the executive and judicial powers shall become effective. No one doubts that Congress could abolish the State Department, or the Circuit Courts of Appeal, or any other position not created by the Constitution. But that is emphatically *not* to say that, once having created these agencies, Congress may also say *how* the executive and judicial powers shall be administered.

Here, for example, Congress could, unquestionably, have abolished the Department of the Interior, or the Government of the Virgin Islands, or the Federal Communications Commission. But it did not do that. It did not in any degree affect the work which the Department of the Interior or the Federal Communications Commission were required to do under the statutes. Here, Congress attacked the *incumbent* of the office—asserting a power not only to establish the mechanisms by which the Government should be carried on, but also *how it should be exercised.* That, without a shadow of a doubt, is beyond the pale; that, if it is

possible, means the end of an independent executive department.[33]

In *State* ex rel. *Tolerton* v. *Gordon*, 236 Mo. 142, 139 S. W. 403, in which a similar attempt to force the ouster of an executive official was condemned, the Court stated the same point (139 S. W. at p. 410):

> If in the discharge of a duty imposed both by the Constitution and by the law the executive has exercised his prerogative by appointing to the office of game and fish commissioner a person who in his judgment is faithfully performing his official duty, is it within the power of the Legislature to review the action of the executive and paralyze it by providing in an appropriation act that such appointee shall not receive compensation for his services in such office, although any other person may? If so, then the Legislature may designate, in an appropriation act for the payment of salaries, those who shall and those who shall not be entitled to compensation thereunder, and thus hamper the executive, not only in the exercise of the appointing power, but also in carrying out the mandate of the organic law in taking care that the laws are faithfully executed. Under the authorities cited it is clear that such power has not been granted to the lawmaking branch of the government. The Legislature has the undoubted power to make or to refuse to make an appropriation authorized by the Constitution, and it has the power to create or abolish an office when unrestrained by constitutional limitations, but it has not the power to say who shall not be compensated out of an appropriation for the payment for official services rendered, nor to say indirectly who shall be appointed to or removed from the office thus created.

Justice Graves, concurring, also stated the same point (*id.* p. 413):

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[33] Cf. *United States* v. *Klein*, 13 Wall. 128; *State* ex rel. *Worrell* v. *Carr*, 129 Ind. 44; *Reid* v. *Smoulter*, 128 Pa. St. 324; *People* ex rel. *Burley* v. *Howland*, 155 N. Y. 270.

> In this case the Legislature determined that their game laws should be enforced. They determined that the appropriation should be made, but to that appropriation they tack on a proviso, which strikes at the powers of another department. In the body of the bill the appropriation is made, but by the proviso they undertake to say to the Governor there is one man whom you cannot select to enforce these laws. This we think, under our own holdings, is beyond their power.

Here, in the same way, Congress has *not* determined that there should be no Executive Assistant to the Governor of the Virgin Islands, nor that there should be no Foreign Broadcast Intelligence Service. Presumably, it could have determined that either or both should have been abolished. But instead it has here stated that the offices were to be continued, the work was to continue, the appropriation was available, *but these plaintiffs cannot do that work, or any other work, for this Government.*

Indeed, we believe that Section 304, in its provision for permanent disqualification of plaintiffs from gainful Government employment, is equally an interference with the appointing power of the executive—and by the same token, with the confirmation power of the Senate on executive nominations—and would be equally unconstitutional if plaintiffs had not been officers of the Government at the time the bill was passed. Congress has broad powers, of course, in prescribing qualifications for office, as we have already stated (pp. 66-68, *supra*). But the power to prescribe qualifications certainly cannot fairly be said to extend to the point where Congress may say that irrespective of qualifications, A, B, and C, can never be utilized by the executive, or by the judiciary, or by any other agency of the United States, to carry out their functions. It is no answer to assert that the disqualification of three people is *de minimis;* that there are still so many millions left that the interference with the power to appoint is unimportant. One need only see that a rider like this could also say that there shall be perpetual disqualification for everyone who

voted for Norman Thomas, or Wendell Wilkie, or who held any position in the first Roosevelt Administration. With no variation from the *principle* asserted in Section 304, Congress could nullify a full and free exercise of the appointing power.

3. The history of similar riders in Congress also condemns Section 304.

In times of stress, when feelings run high and emotions tend to supplant reason and sober judgment, it is not surprising to find that things are done which would not be done, or even thought of, during more normal times. A brief reference to the few other occasions in our history when riders aimed at particular individuals have been attempted will show that in the past, with one exception, even when passions were sufficiently inflamed to suggest resort to this course of legislation, sound judgment and cooler heads have prevailed, and the proposals have been defeated. None of these riders, it should be noted, was in any sense as drastic and sweeping as Section 304; none of them sought to limit more than the funds contained in the appropriation bill to which it was attached.

We do not urge, of course, that Congress has, in those instances voted on the matter solely on the issue of its power to act. The merits of the particular controversy are inevitably intertwined with the issue of constitutional authority, and no one can say, in any case, which consideration swayed the vote. We do believe, however, that the almost unanimous rejection of the far less drastic riders, coupled with the vigorous and effective arguments advanced against the existence of the power thus to misuse the appropriation power, are highly significant in indicating that the power does not exist.

Events such as this do not lend themselves to easy classification in indices of congressional proceedings. Hence we are not able to say with certainty that there are not other

riders which might be added to this list. If so, we can be relatively certain that they were unsuccessful attempts, for no one, in the course of the debates on Section 304, or in the comments on it since, or in this litigation, has adduced any simila. legislation at any time in our history.

In 1924, the War Department Appropriation Bill (H. R. 7877) contained this proviso: "*Provided*, That no part of this sum shall be paid to Major Charles C. Cresson, United States Army." Major Cresson had, somewhat earlier, presided over the Army court martial of Col. Hunt, who was allegedly responsible for the escape of Grover Cleveland Bergdoll—a court martial which had resulted in the acquittal of Col. Hunt. A motion to strike this proviso (*Cong. Rec.*, Vol. 65, p. 5031) resulted in considerable debate during which the principle of the proviso was mercilessly attacked both on the basis urged in this Point, and also on the ground that the provision was a bill of attainder. See, *e.g.*, Mr. Stengle of New York (*id.* p. 5032); Mr. Wurzbach of Texas (*id.* p. 4744); Mr. Tucker of Virginia (*id.* p. 5033). The proviso was stricken by a vote of 158 to 10 (*id.* p. 5036).

On the same day, a similar proviso was considered which would have denied any appropriation to Col. Hunt (*id.* p. 5041). Again, the attack was on fundamental grounds. See, *e.g.*, Mr. Newton of Minnesota (*id.* p. 5042). That proviso, too, was stricken by a vote of 47 to 21 (*id.* p. 5043).

The next instance arose in regard to the Interior Department Appropriation Bill for the year ending June 30, 1940 (H. R. 4852). The Senate Appropriations Committee added an amendment (*Cong. Rec.*, Vol. 84, p. 4308):

> *Provided*, That no part of this appropriation shall be available for the payment of the salary of the present Superintendent of the Great Smoky Mountain National Park.

Again the proposed amendment was attacked on constitutional grounds. See, *e.g.*, Senator Schwartz of Wyoming

(*id.* p. 4312); Senator Taft of Ohio (*id.* p. 4342). The amendment was defeated by a vote of 31 to 28 (*id.* p. 4346).

In March 1941, and again in June, Mr. David Lasser had been the object of bitter attacks in the House. See *Cong. Rec.*, Vol. 87, pp. 2540, 2596, 4959. In June, during a debate on the Emergency Relief Appropriation Bill for the year ending June 30, 1942, an amendment was offered (*id.* p. 5110):

> *Provided further*, That no part of any appropriations contained in this act shall be used to pay the compensation of David Lasser.

After some discussion on the amendment, and attacks against its principle (see, *e.g.*, *id.* p. 5111), it was agreed to by a vote of 131 to 88 (*id.* p. 5113). Some two weeks later, in further debates, the amendment was again attacked. See Voorhis of California, *id.* p. 5515; Flannagan of Virginia, *id.* p. A2984. The bill was passed, however, with the rider, and became law in that form. 55 Stat. 396.

Later the House Appropriations Committee became convinced that the proviso had worked a serious injustice, and included in the National Defense Supplemental Appropriation Bill (H. R. 6159) a section repealing the proviso. See H. Rep. No. 1470, 77th Cong., 1st Sess., pp. 38-39. However, the point of order that this was legislation in an appropriation bill was made in the House, and no opportunity was afforded for a vote. See *Cong. Rec.*, Vol. 87, pp. 9493-9494.

This proviso, it is fair to state, we think was also unconstitutional, though it is far less drastic than Section 304. It applied only to the money appropriated by one act, and was therefore not a permanent ban on gainful Government employment, as is Section 304. As stated by Mr. Hobbs of Alabama in the debate on Section 304 (*Cong. Rec.*, Vol. 89, p. 4598):

> The fact that Congress adopted the method of removal now proposed in the case of David Lasser, neither

changes the Constitution nor justifies the procedure. One wrong never justifies another.

In May, 1941, Dr. Ruth Gruber came under similar attack, and an amendment was offerred to the Interior Department Appropriation Bill that "No part of the funds appropriated in this Act shall be paid to Dr. Ruth Gruber" (*Cong. Rec.*, Vol. 87, p. 4072). Again an attack was made on the principle of the amendment, but it was agreed to by a vote of 64 to 49 (*id.* p. 4073). In the Senate, however, the Appropriations Committee eliminated the clause, and the action was approved without discussion (*id.* p. 4677).

In November, 1942, the Committee on Agriculture of the House reported out a bill to aid agriculture in Puerto Rico (H. R. 7505), with the addition of the following clause (see H. Rep. No. 2641, 77th Cong., 2d Sess., p. 1):

> Any appropriation made pursuant to this Act shall be conditioned that the funds shall not become available at any time during the service of the present Governor of Puerto Rico.

There was no debate on the bill, and it died in that Congress.

Finally, in the Independent Offices Appropriation Bill for 1943 (H. R. 6430) the House had attached a proviso directed against Dr. Watson, one of the present respondents, as follows (*Cong. Rec.*, Vol. 88, p. 3997):

> *Provided*, That no part of any appropriation contained in this Act shall be used to pay the compensation of Goodwin Watson.

Senator Barkley moved to strike it in the Senate (*id.* p. 3997), again asserting the fundamental constitutional objection to such riders. He stated (pp. 3997, 3998, 4001):

> It seems to me that it is brutal and arbitrary to undertake to legislate a man out of office by providing that out of the appropriation he shall not be paid a salary. The appointment of men to public office is an executive,

function, not a legislative function, and the whole history of Congress, with one or two exceptions, indicates that it has frowned upon provisions of this kind which are, in fact, bills of attainder; that is what they amount to.

* * * * * *

The provision we are considering is not a Senate committee provision, it is a House provision, adopted by the House, which has time and again refused to do any such thing. One of the ablest speeches ever made against an amendment of that sort was made by Henry St. George Tucker, one of the great constitutional lawyers of the United States, as the Senator from Missouri will testify, who was a stickler for the Constitution. He interpreted such an attempt, in language which I think no one could misunderstand, as a bill of attainder. It is simply a legislative effort to punish a man without giving him a trial.

* * * * * *

It is not the function of Congress to appoint men or dismiss them, but we are asked to exercise an executive function by providing that out of all the thousands of Government employees, here is a man we are going to dismiss, and we are asked to dismiss him by providing that he cannot draw his pay. The Chairman of the Commission under which he works testifies in behalf of this man.

* * * * * *

If this principle were to be included as a part of our legislative policy, it would be necessary only to get a sufficient number of votes to add a proviso, in the appropriation for the payment of our judiciary, that the Chief Justice of the United States should not be paid out of the appropriation, if a majority of the Members of the House and Senate disagreed with some opinions he might have rendered as Chief Justice, or the way in which he presides over the Supreme Court. We might legislate him out of office merely by refusing to pay him. It seems to me that the ramifications, implications, and possibilities of this sort of legislation ought not to be encouraged.

See also the remarks by Senators Clark of Missouri (*id.* p. 3997), Taft of Ohio (*id.* p. 3997-3998), Murdock of Utah (*id.*

p. 4000), Danaher of Connecticut (*id.* p. 4001), and Hill of Alabama (*ibid.*).

Senator Barkley's motion to strike the amendment was agreed to (*id.* p. 4004).[34]

In summary, it is fair to conclude that Congress has itself usually recognized the dangers inherent in the practice of which Section 304 is the result. Only in the case of Mr. Lasser has a provision even remotely resembling this section received Congressional approval, and in that case the ban, though equally dangerous, was far less sweeping and less drastic than Section 304. The Congressional practice can fairly be summed up in the words of Senator Barkley (*Cong. Rec.*, Vol. 88, p. 3997):

> I could cite a number of cases where the House of Representatives have undertaken to deny the right of a man to hold an executive position by taking his pay away from him, in an effort to perform an executive function by firing a man by a legislative bill of attainder; but until this was done in this particular bill, the House of Representatives has almost uniformly frowned upon that practice, and has defeated the efforts when they were made.

4. THE CONDITIONAL NATURE OF SECTION 304 DOES NOT CHANGE THE RESULT.

Section 304, in the form in which it was finally adopted, contained the provisions which made the ban on the use of any appropriations to pay these respondents effective on November 15, 1943 (the Act is dated July 12, 1943)—

[34] See also the debates on Section 304 itself, in which the same points were made with equal vigor: Mr. Celler of New York (*Cong. Rec.*, Vol. 89, p. 4546); Mr. Ford of California (*id.* p. 4549); Mr. Folger of North Carolina (*id.* p. 4547), Mr. Coffee of Washington (*id.* pp. 4547-4548, 4587-4588), Mr. Hobbs of Alabama (*id.* pp. 4598, 5514-5517). In the Senate, the debate was likewise opposed to Section 304 on principle. Senator Barkley reiterated the position he had taken earlier on the Watson rider (*supra*, pp. 107-108) (see *id.* p. 6693), and several other Senators joined in expressing their disapproval.

> * * * unless prior to such date such person has been appointed by the President, by and with the advice and consent of the Senate * * *.

See pp. 2-3, 22, *supra*. This clause does not avoid any of the constitutional difficulties with which we have already dealt.

When we assume, as we must, that the removal of respondents by legislative action is an unconstitutional interference with the executive department, there is no essential difference presented by a provision which makes the removal conditioned upon further action by the President and the Senate. In either case, the Congress is purporting to deal with the incumbent of an office, and to subject the executive branch to a new condition without which the incumbent may not remain. In either case, the power of the executive department over the personnel of its offices is seriously curtailed. In either case, Congress is assuming a power which it does not in fact possess—a power to remove Government personnel. The condition, in this case, is no more than the manner in which Congress has chosen to exercise this alleged power. If the power did exist, it could be exercised absolutely, or on any condition which Congress might choose to impose—unanimous Senate consent, for example, or unanimous consent of both Houses, or any of others which may readily be imagined. But since the power does not exist, the attempt to palliate the consequences of its exercise by this escape device cannot change in any way the fact that Congress is assuming a power which it does not possess.

Actually, this is far more of an interference with the executive than the provision held void in the *Myers* case—that the Senate must concur in removals. In that case, the legislative limitations on the executive power did not operate until the executive himself wished to eliminate the incumbent, and in most cases the approval of the removal was accomplished by the approval of a new nominee for the position. Here however, Congress asserts that it may initiate

removals, and make that initiation effective unless the President and the Senate affirmatively step in to prevent it.

This is not a *limitation* on removals, in other words, but an affirmative act of legislative removal. If the former is an unconstitutional interference with the executive, as held in the *Myers* case, certainly this far more sweeping provision is likewise such an interference. Nor, because it is not a limitation on removals, can it obtain any support from the decision in *Humphey's Executor* v. *United States*, 295 U. S. 602.

Nor, finally, is this analogous to the impeachment process. Certainly this is not justifiable as the equivalent of impeachment. Here, the man is, in effect, presumed guilty, since he is to be removed unless he is affirmatively approved, while in impeachment he is removed only if he is first found guilty. Here, he has no benefit of the two-thirds rule in impeachment; a simple majority can accomplish his ouster. Here he has no benefit of a trial; he may be voted down five minutes after his name is submitted, with no opportunity to defend himself; in impeachment proceedings, he has a full and fair trial at the bar of the Senate. The differences could be elaborated, but enough has been said to show how far removed the operation of the section is from impeachment, and by the same token, how much farther it permits the legislative department to control the other branches of the Government than the Framers contemplated in the provision for impeachment.

It scarcely needs to be said that this is not the equivalent of imposing upon a position the requirement of Senate confirmation, although this was urged by *Amicus* in the court below as an analogy in support of Section 304. The office of Executive Assistant to the Governor of the Virgin Islands does not now require Senate confirmation of the incumbent, nor do the offices held by Watson and Dodd. We need not inquire whether they could be made such, because it is plain that nothing like that has been done. It is three *indiriduals* who were made liable to Senate approval, or else be forever ousted.

We submit, therefore, that Section 304 must be stricken down as an unconstitutional attempt to exercise a power which Congress does not possess—the power to remove and to prevent the return to Government employment of the three respondents. On this ground, alone, respondents are entitled to recover.

III

Section 304 is Unconstitutional as a Bill of Attainder.

The second fundamental objection to Section 304 is that it is a bill of attainder within the meaning of the prohibition in Article I, Section 9, clause 3 of the Constitution. The permanent disability for any future gainful Government employment of respondents falls plainly within this ban—and this without regard to any official status which respondents had at the time of its enactment, or to their unlawful removal from that status, with which we have dealt in Point II, *supra*. Both Judge Madden (R. 46) and Judge Whittaker (R. 41-42) held Section 304 invalid on this ground.

A. THE CONSTITUTIONAL PROVISION INVOLVED.

Article I, Section 9, clause 3 of the Constitution imposes a categorical and unequivocal limitation on the powers of Congress:

> No bill of attainder or ex post facto law shall be passed.[35]

Bills of attainder, within the meaning of this provision, have had their classic definition in the cases of *Cummings* v. *Missouri*, 4 Wall. 277, and Ex parte *Garland*, 4 Wall. 333, *infra*, pp. 116-121. Before passing to those decisions, however, it will be worth noting the constitutional background of this clause. The unanimity with which it was agreed to emphasizes the abhorrence with which such legislative acts

[35] A similar prohibition against action by the States is contained in Article I, Section 10, clause 1.

were regarded. It emphasizes, too, the need that the clause be liberally construed to accomplish the determination of the Framers that any recourse to such legislation should be prevented for all time.

The Framers were thoroughly familiar with the subject with which they were dealing. Earlier and contemporaneous writings, not only by the men who drafted the Constitution, but also by authorities whose works were widely known at the time to American lawyers and statesmen, show an intimate appreciation of this and related parliamentary machinery. *The Federalist*, Nos. 44 (Madison), 65, 66, 78 (Hamilton), 84 (Madison) (1802 ed.) Vol. I, p. 296, Vol. II, pp. 121, 128, 211, 266; Blackstone, *Commentaries* (3d ed. 1884 Bk. I, p. *46, Bk. IV, pp. *259 *et seq.*; Coke, *Fourth Institute* (1809 ed.) pp. 14, 36-39; Wooddeson, *Law Lectures: A Systematical View of the Laws of England* (1792) Nos. 40 and 41; *DeLolme on the Constitution* (1838 ed.) Vol. I (Stephens Intro.) pp. 347, 401, 449, Vol. II (DeLolme) pp. 603-607; Hale, *Jurisdiction of the House of Lords or Parliament* (1796 ed.) Ch. XVI; Comyns, Sir John, *A Digest of the Laws of England* (4th ed. 1793) Vol. V, "Parliament" H6 and L18-46. See, also, *Reasonableness of Parliamentary Proceedings by Attainders, Banishments, Pains and Penalties in Cases of High Treason* (printed by T. Payne, 1723) and West, Richard, *A Discourse Concerning Treasons and Bills of Attainder* (1716). Indeed, there were not only English,[36] but Colonial precedents as well,

[36] The latest of the English acts had been passed early in the century. The Duke of Ormond, and other Tory leaders under Queen Anne, were first impeached in the House of Peers by the Whig House of Commons. The accused failed to answer and fled, whereupon the Commons brought bills of attainder against them in 1715. See *Reasonableness of Parliamentary Proceedings by Attainder, &c.* (1723) pp. 45 *et seq.* See, also, note 44, *infra*. Sir Francis Atterbury, Bishop of Rochester, had been deprived of all his ecclesiastical offices and incapacitated to hold civil office by a bill of pains and penalties passed in 1722. 9 Geo. I, c. 17; Howell, *State Trials*, Vol. XVI, 644.

for such bills had been used in America during the colonial period and in many of the states during and after the Revolution. Story, *Commentaries on the Constitution* (5th ed. 1891) Sec. 1373; Adams, *Constitutional History of England* (Schuyler rev. 1934) p. 229; Cooley, *Principles of Constitutional Law* (3d ed. 1898) p. 311; Pound, Roscoe, *Justice According to Law: Part III-Legislative Justice* (1914) 14 Col. L. Rev. 1, 2; Thompson, James Westfall, *Anti-Loyalist Legislation during the American Revolution* (1908) 3 Ill. L. Rev. 81, 147.[37] They were not prohibited by the Articles of Confederation.

The abhorrence with which these legislative trials and punishments were viewed was expressed on all sides, as wholly unworthy of a free government.[38] See, *e.g., The Federalist*, Nos. 44, 84; Wooddeson, *supra*, No. 41; Blackstone,

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[37] American cases dealing with the effects of acts of attainder were numerous. See, *e. g., James's Claim*, 1 Dall. 47 (Pa. Sup. Ct.); *Respublica* v. *Gordon*, 1 Dall. 233 (Pa. Sup. Ct.); *Pemberton's Lessee* v. *Hicks*, 3 Dall. 479 (Pa. Sup. Ct.); *Ware* v. *Hylton*, 3 Dall. 199, and *Cooper* v. *Telfair*, 4 Dall. 14 (Georgia act of attainder passed before Federal Constitution adopted); *Inglis* v. *Sailors' Snug Harbor*, 3 Pet. 99; *Carver* v. *Astor*, 4 Pet. 1; *Sleight* v. *Kane*, 2 Johns. 236 (N. Y.), and *Jackson* v. *Sands*, 2 Johns. 267 (N. Y.) (under New York Act of Attainder and Banishment of 1779, I Greenleaf's Laws N. Y. 26); *Thompson* v. *Carr*, 5 N. H. 510. *Cf. Respublica* v. *Doan*, 1 Dall. 86, 89, 93 (Pa. Sup. Ct.) (outlawry by judicial proceedings compared with bill of attainder). Watson, *Constitution of the United States* (1910) Vol. I, p. 735n, reproduces a bill of attainder prepared by Jefferson and passed by the legislature of Virginia.

[38] John Jay had written Governor Clinton of New York from Spain in 1780, on hearing of a New York bill of pains and penalties (imposing banishment and forfeiture) passed in 1779. "If truly printed," he wrote, "New York is disgraced by injustice too palpable to admit even of palliation." Jay, *Correspondence and Public Papers* (1890) Vol. I, p. 315. See, also, John C. Hamilton, *History of the Republic of the United States* (based on writings of Alexander Hamilton and his contemporaries) (1859) Vol. III, pp. 23 *et seq.*

supra, Bk. I, pp. *46, *136. See, also, opinions of Justices Chase and Paterson (one of the Framers) in *Calder* v. *Bull*, 3 Dall. 386, 388, 395 (1798). There was not so much as a word to question the desirability of excepting them from the legislative powers delegated to Congress by the Constitution. Farrand, *Records of the Federal Convention of 1787* (1934) Vol. II, pp. 376, 448, 571, 596, 610, 656; Elliot, *Debates* (1845) Vol. I, p. 311, Vol. V (Madison's Diary), pp. 462-463, 545; Meigs, *Growth of the Constitution* (1924), pp. 182 *et seq.*[39] This silence, in the Convention, and in the ratification debates, reflects an informed appreciation of the simple purpose of the interdiction: there were to be no punishments administered by an aggressive or angry legislature, with or without acquiescence by the executive.

For present purposes, it is probably unnecessary to discuss the distinction between bills of attainder and *ex post facto* laws. A legislative act which itself inflicts punishment—a bill of attainder—necessarily operates on past facts, and for that reason the essential similarity of the

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[39] The single recorded opinion as to this prohibition against either federal or state action appears in Madison's Diary. On the introduction, late in the Convention, of the proposed clause limiting the federal legislature, Madison reports (Elliot, *Debates* (1845) Vol. V, pp. 462-463):

> Mr. *Gerry* urged the necessity of this prohibition, which, he said, was greater in the national than the state legislature; because, the number of members in the former being fewer, they were on that account the more to be feared.
>
> Mr. *Gouverneur Morris* thought the precaution as to *ex post facto laws unnecessary*, but essential as to bills of attainder.
>
> Mr. *Ellsworth* contended, that there was no lawyer, no civilian, who would not say that *ex post facto* laws were void of themselves. It cannot, then, be necessary to prohibit them.
>
> * * * *
>
> The question being divided, the first part of the motion, relating to bills of attainder, was agreed to, *n. m. con.*

See also Farrand, *Records*, Vol. II, p. 376, Vol. III, p. 165.

two prohibitions is manifest. Earlier cases did not attempt to separate the two categories. *E.g.*, *Calder* v. *Bull*, *supra*; *Fletcher* v. *Peck*, 6 Cranch 87. In the *Cummings* case, however, the Court held the test oaths there involved to be unconstitutional on both grounds: as bills of attainder because they were legislative acts which inflicted punishwithout judicial trial (see 4 Wall. at pp. 323, 377), and as *ex post facto* laws because they rendered acts punishable in a manner in which they were not punishable when they were committed (see *id.* pp. 326, 377). Perhaps it is fair to say that under the definition of *ex post facto* laws in the *Cummings* and other cases, bills of attainder comprise those *ex post facto* laws which the legislature itself, by the purported exercise of judicial power, assumes to make operative. We shall confine our discussion to bills of attainder, since we believe that Section 304 falls within the ban on even this more limited classification, though it should not be forgotten that the constitutional inhibition extends equally to all *ex post facto* laws.

B. SECTION 304 IS A BILL OF ATTAINDER, AS THAT TERM HAS BEEN DEFINED AND APPLIED BY THE COURT.

The leading cases on bills of attainder are, of course, *Cummings* v. *Missouri*, 4 Wall. 277, and Ex parte *Garland*, 4 Wall. 333. The *Cummings* case involved the validity of a provision of the Missouri Reconstruction Constitution which made an Oath of Loyalty a prerequisite to the holding of any office under the Constitution, to the practice of many professions, and to the holding of many private offices. The Oath of Loyalty, which was specified in the Constitution, required avowal that the person taking it had never been in armed hostility to the United States, nor had ever, by act or word, manifested adherence to the enemies of the United States, nor sympathy with those rebelling against it, nor had harbored, aided or countenanced any person so engaged, and the like. Cummings, a Catholic priest, was convicted of

preaching without having taken the test oath. His conviction was set aside by this Court.

The *Garland* case involved a similar test oath prescribed by an Act of Congress passed in July, 1862 (12 Stat. 502), and extended in 1865 to embrace attorneys and counsellors of the courts of the United States (13 Stat. 424). In March, 1865, the rules of this Court relating to the qualification for practice were amended to include the new oath. Garland, an attorney admitted to practice in the Court in 1861, petitioned the Court in July, 1865, for permission to continue to practice as an attorney and counsellor. The petition was granted, and the amended rule rescinded.

In the *Cummings* case, in holding the test oath provision void as a bill of attainder, the Court defined that phrase as follows (4 Wall. at p. 323):

> "A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties.

That definition is an accurate statement of the law and practice known to English and early American legislative bodies. Blackstone, *supra*, Bk. IV, p. *259; Wooddeson, *supra*, No. 41; Anson, *Law and Custom of the Constitution* (5th ed. 1922) Vol. I, p. 381, 388; *Calder* v. *Bull*, *supra*, at p. 388; Story, *supra*, Secs. 1344, 1373; Cooley, *supra*, pp. 310-312; Pomery, *Introduction to Constitutional Law in the United States* (1875 ed.) p. 319. Other cases have not modified it or limited it. See Ex parte *Garland*, *supra*; *Drehman* v. *Stifle*, 8 Wall. 595, 601; *Pierce* v. *Carskadon*, 16 Wall. 234.[40]

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[40] There have been many lower court and state cases to the same effect, *e. g.*, *Jackson* v. *Sands*, 2 Johns. 267, 272 (N. Y.) (Kent, J.); *In the Matter of Dorsey*, 7 Porter 293 (Ala.); *Gaines* v. *Buford*, 1 Dana 481 (Ky.); *Martin* v. *Snowden*, 18 Gratt. 100 (Va.); *Yong Sung Hee*, 36 Fed. 437 (C. C. Ore.).

Under that definition, the vice of Section 304 is manifest. It becomes even more apparent as the elements of that definition, and its application in the *Cummings* and *Garland* cases, are examined in detail.

1. THE SUBSTANCE, NOT THE FORM, OF THE STATUTE, CONTROLS.

Here, as elsewhere in the Constitution, we are dealing with the *substance* of things, not with their *form*. See pp. 91-94, *supra*. The *Cummings* case itself furnishes an example. In that case, the argument of the State attempted to avoid, on technical grounds, an application of the analogous clause applicable to the States. It pointed out that the test oath provision did not on its face define any crime, assert guilt of named or readily ascertainable individuals, or purport to impose any punishment directly—as did bills of attainder at common (parliamentary) law. The Court categorically rejected any such narrow and restrictive view of the Constitutional prohibition.[41] The statement warrants full quotation (4 Wall. at pp. 324-325, 329):

> If the clauses of the second article of the constitution of Missouri, to which we have referred, had in terms declared that Mr. Cummings was guilty, or should be held guilty, of having been in armed hostility to the United States, or of having entered that State to avoid being enrolled or drafted into the military service of the United States, and, therefore, should be deprived of the right to preach as a priest of the Catholic Church, or to teach in any institution of learning, there could be no question that the clauses would constitute a bill of attainder within the meaning of the Fed-

[41] The same view in respect to all *ex post facto* laws had been taken by Chief Justice Marshall in *Fletcher* v. *Peck*, 6 Cranch 87 in which he had concluded (pp. 138-139):

> This rescinding act would have the effect of an *ex post facto* law. * * * This cannot be effected in the form of an *ex post facto* law, or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant?

eral Constitution. If these clauses, instead of mentioning his name, had declared that all priests and clergymen within the State of Missouri were guilty of these acts, or should be held guilty of them, and hence be subjected to the like deprivation, the clauses would be equally open to objection. And, further, if these clauses had declared that all such priests and clergymen should be so held guilty, and be thus deprived, provided they did not, by a day designated, do certain specified acts, they would be no less within the inhibition of the Federal Constitution.

In all these cases there would be the legislative enactment creating the deprivation without any of the ordinary forms and guards provided for the security of the citizen in the administration of justice by the established tribunals.

The results which would follow from clauses of the character mentioned do follow from the clauses actually adopted. The difference between the last case supposed and the case actually presented is one of form only, and not of substance. The existing clauses presume the guilt of the priests and clergymen, and adjudge the deprivation of their right to preach or teach unless the presumption be first removed by their expurgatory oath—in other words, they assume the guilt and adjudge the punishment conditionally. The clauses supposed differ only in that they declare the guilt instead of assuming it. The deprivation is effected with equal certainty in the one case as it would be in the other, but not with equal directness. The purpose of the lawmaker in the case supposed would be openly avowed; in the case existing it is only disguised. The legal result must be the same, for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding.

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> Now, as the State, had she attempted the course supposed, would have failed, it must follow that any other mode producing the same result must equally fail. The provision of the Federal Constitution, intended to secure the liberty of the citizen, cannot be evaded by the form in which the power of the State is exerted. If this were not so, if that which cannot be accomplished by means looking directly to the end, can be accomplished by indirect means, the inhibition may be evaded at pleasure. No kind of oppression can be named against which the framers of the Constitution intended to guard, which may not be effected.

It matters not, therefore, that the statute under attack is not in the *letter* of the English precedents. The *substance* of those precedents, no matter in what form it may be made manifest, is proscribed by the Constitution. This is the clear implication of the statement by Mr. Justice Holmes in *McFarland* v. *American Sugar Company*, 241 U. S. 79, 85. The same point has been summarily stated in Cooley, *Principles of Constitutional Law* (3d ed. 1898) pp. 311-312:

> It is conceded on all sides, that the purpose of the constitutional inhibition is to take away the power to pass either [bills of attainder or of pains and penalties]; in short, wholly to deprive the government of any power to inflict legislative punishment for criminal, or supposed criminal conduct. And a case in which the punishment is imposed indirectly * * * is as much a bill of attainder as is an act directly imposing a punishment.

See, also, *Burgess* v. *Salmon*, 97 U. S. 381, 385.

That Section 304 takes the *form* of a denial of appropriations, therefore, is of no significance, if its *substance* is that of a bill of attainder. In this respect, too, the power of appropriation lodged in Congress by the Constitution is subject to the positive prohibition contained in other parts of that document. See pp. 90-99, *supra*. Our concern is the nature of the constitutional prohibition, not the manner in

which it is attempted to be circumvented. The language of the Court in the *Cummings* case is directly applicable here (4 Wall. at p. 325):

> The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding.

The same point was made in *United States* v. *Klein*, 13 Wall. 128.

We turn, then, to the substantive elements of bills of attainder.

2. BILLS OF ATTAINDER ARE CHARACTERIZED BY THEIR APPLICATION TO NAMED OR EASILY ASCERTAINABLE INDIVIDUALS

It is not necessary, as the *Cummings* and *Garland* cases themselves illustrate, that the persons to be affected by a bill of attainder be named in the bill. Yet it was the outstanding characteristic of bills of attainder, as they were known at the time of the Constitution, that they did operate against a particular individual. Richard Wooddeson, who succeeded Blackstone as Vinerian Professor at Oxford, states of them during a course of lectures delivered in 1777 (*Law Lectures*, *supra*, No. 41, at p. 622) that "instead of being general, they are levelled against the particular delinquent." By the same token, they were of limited scope, and had no effect except to work the punishment on the individuals to be proscribed; as Wooddeson states it, "instead of being permanent, they expire, as to their chief and positive effects, with the occasion" (*id.* at p. 623).

In the *Cummings* and *Garland* cases, this factor was absent. See also *McFarland* v. *American Sugar Company*,

241 U. S. 79, 85, 86. The test oaths there involved operated equally on the whole community, and the argument of the dissenting judges was not without force, that under the circumstances the acts in question were not more than general legislation prescribing qualifications for office, or for the professions. See 4 Wall. at pp. 389-390. The majority of the Court, however, held that notwithstanding their apparent general application, the test oath statutes contained the characteristic intention to inflict punishment on certain ascertainable individuals for prior acts which would otherwise have been unpunishable. In the *Garland* case, for example, the Court said (4 Wall. at p. 379):

> The legislature may undoubtedly prescribe qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life. *The question, in this case, is* not as to the power of Congress to prescribe qualifications but *whether that power has been exercised as a means for the infliction of punishment,* against the prohibition of the Constitution. That this result cannot be effected indirectly by a state under the form of creating qualifications we have held in the case of *Cummings* v. *The State of Missouri,* and the reasoning by which that conclusion was reached applies equally to similar action on the part of Congress. (Italics supplied.)

That even in such a case the Court denounced the acts for what they were—legislative penalties for past offenses—only serves to emphasize the extent to which the Court will cut through to the substance of the challenged statute.[42]

In the present case, of course, the argument upon which the dissenting judges in the *Cummings* and *Garland* cases

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[42] Of course, statutes which operate generally to prescribe, for example, qualifications for office or for professional standing, may be applied to, or affect such pursuits retrospectively without violation of the Constitution. See, *e. g., Hawker* v. *New York*, 170 U. S. 189; *Dent* v. *West Virginia*, 129 U. S. 114; *Cases* v. *United States*, 131 F. (2d) 916 (C. C. A. 1st).

so strongly relied is not available. Section 304 names, *eo nomine*, the three respondents—"instead of being general, they are levelled against the particular delinquent." Section 304 did not provide any general qualification for office, or even for the offices which the particular respondents occupied at the time it was passed and became effective—"instead of being permanent, they expire, as to their chief and positive effects, with the occasion." It applies to no office or profession any qualification of any sort. It does not even suggest that if respondents changed their views, they would again be qualified for federal public office, or that if anyone else shared the views which respondents are alleged to have he, too, would become ineligible. Section 304 was simply and explicitly directed at respondents, and at respondents alone. In the language of the *Cummings* case (4 Wall. at p. 320), Section 304 "was required in order to reach the person, not the calling."

Actually, even the motive held adequate to condemn a *class* statute in the *Cummings* and *Garland* cases is present in respect to Section 304. We need not repeat the legislative background of Section 304 (pp. 7-20, *supra*) to demonstrate that, as in the test oath cases, that Section eventuated from a belief that if Congress did not act to punish these individuals, they would escape all punishment. Congress created a new offense—"subversive activity"—tried respondents, determined their guilt, and inflicted the punishment it deemed commensurate with the gravity of the offense. Again, as in the test oath cases, the offense bore no necessary relation to their work; the Chairman of the Kerr Committee admitted frankly that the Committee's trial had not dealt with respondents competence, or whether they were doing, or had done, a good, bad or indifferent job (*Cong. Rec.*, Vol. 89, p. 4583). The issue was whether they had committed the offense; the permanent ban on future federal employment was the penalty.

3. BILLS OF ATTAINDER ARE "LEGISLATIVE ACTS WHICH INFLICT PUNISHMENT * * *".

It is clear from the *Cummings* and *Garland* cases that the question of what constitutes "punishment" within the meaning of the definition of bills of attainder is not to be narrowly construed.

In the *Cummings* case, the constitutional provision there held invalid made the test oath a prerequisite for attorneys, clergymen, teachers, corporate officials and persons holding positions of honor, trust or profit for the State of Missouri. It was argued in support of the provision that it inflicted no punishment because " 'to punish one is to deprive him of life, liberty, or property, and that to take from him anything less than these is no punishment at all' " (4 Wall. at p. 320). The Court left no doubt as to the answer (*id.* pp. 320-321):

> The learned counsel does not use these terms—life, liberty, and property—as comprehending every right known to the law. He does not include under liberty freedom from outrage on the feelings as well as restraints on the person. He does not include under property those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors. *The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the the causes of the deprivation determining this fact.* Disqualification from office may be punishment, as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian, may also, and often has been, imposed as punishment. (Italics supplied.)
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> The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every

> one, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no other wise defined.

In the *Garland* case, the effect of the federal statute there in question was to exclude from the practice of law before the federal courts all attorneys who were unable to take an oath as to past loyalty. This, too, the court held, could "be regarded in no other light than as punishment for such conduct" (4 Wall. at p. 377).

Actually, no one can reasonably doubt that Section 304 inflicts punishment. Permanent disqualification from gainful federal employment is not merely punishment—it is *severe* punishment, as that term is ordinarily understood. Indeed, it is the extreme penalty for conviction upon impeachment permitted by the Constitution (Article I, Section 3, clause 7, *supra*, p. 46); removal from office is the necessary consequence of Senate conviction, but permanent disqualification for office is discretionary with the Senate. Story, *supra*, Sec. 803. It has on occasion been specified by Congress as the punishment for serious offenses.[43] Permanent disqualification from state employment was likewise one of

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[43] In 1790, permanent disqualification to hold "any office of honor, trust or profit under the United States" was a penalty for attempting to corrupt a federal judge. Act of April 10, 1790, Sec. 21, 1 Stat. 117. See, 18 U. S. C. Secs. 237, 238, 35 Stat. 1112. During the Civil War a similar penalty was imposed for insurrection and treason. Act of July 17, 1862, Sec. 3, 12 Stat. 589. It is now a penalty for such crimes as treason (18 U. S. C. Sec. 2, 35 Stat. 1088), interference with free elections by Army or Navy officers (*id.* Sec. 59), acceptance of a bribe, or the like, by a member of Congress (*id.* Secs. 199, 202, 203) or by any official of the United States (*id.* Sec. 207). It is not without significance that a person found guilty of advocacy of forceful overthrow of the Government, or of undermining the loyalty, discipline or morale of the armed forces, is made ineligible for federal employment, but only for five years following his conviction. *Id.* Secs. 9-13, 54 Stat. 670, 671.

the penalties meted out in the provision condemned in the *Cummings* case (see 4 Wall. at p. 317). And disqualification from office was the common, although usually not the total effect of a bill of attainder, or a bill of pains and penalties, at common (parliamentary) law.[44]

The dissenters in the *Cummings* and *Garland* cases argued, again, that in a general statute applicable alike to all persons, the prescribing of qualifications for office or the professions could not be regarded as "punishment" (4 Wall. at pp. 392-396). The majority, however, having concluded that the acts were *intended* to punish, found that the disabilities imposed were punishments within the meaning of the definition. Again, in the present case, there is no such argument available. Section 304 does not proceed against a class, but against these three respondents, and them alone.

This punishment in an impeachment proceeding has been characterized by a House Judiciary Committee as "very severe in its penalties" (H. Rep. No. 141, 45th Cong., 3d Sess.). And certainly it has long been so regarded. See *In the Matter of Dorsey*, 7 Porter 293, 366, 368 (Ala.); *Barker* v. *People*, 3 Cow. 686 (N. Y.), *aff'ing* 20 Johns. 457.

[44] *E.g.*, the *bill of attainder* against Lord Clarendon which declared that he should "be forever disabled from having, holding, or enjoying any office or place of public trust" (see note 51 *infra*); and the *bill of pains and penalties* against Sir Francis Atterbury of like import (see note 36 *supra*).

All authorities agree that bills of attainder (or of pains and penalties), from the earliest recorded instances of their use in England late in the 13th Century onward to their last brief but drastic phase during and at the close of the long quarrel between the Commons and the Stuarts, were a means of punishment of "political" offenders—usually persons of position and influence whose political views were obnoxious to the dominant party. See Creasy, E. S., *Rise and Progress of the English Constitution* (3d ed. 1856) p. 252; Adams, Geo. B., *Constitutional History of England* (Schuyler rev. 1934) pp. 228-229, 280; Naismith, *English Public Law* (1873) p. 153; Stephens, *History of Criminal Law of England* (1883) Vol. I, pp. 160-161; Anson, *Law and Customs of*

Indeed, the characteristics of the punishment under bills of attainder are defined in the dissenting opinion in a manner which illustrates even more clearly the identity of Section 304 with the typical bills of attainder. Mr. Justice Miller, dissenting, states (4 Wall. at p. 388):

> The sentence pronounced and the punishment inflicted were determined by no previous law or fixed rule.

See also Wooddeson, *supra*, pp. 624, 638 *et seq.*[45] Certainly no prior law or rule provided the source of the penalty pre-

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the Constitution (5th ed. 1922) Vol. I, p. 362; Story, *Commentaries on the Constitution* (5th ed. 1891) Sec. 1344; Medley, *English Constitutional History* (6th ed. rev. 1925) p. 167.

"Subverting the government" was a common charge in the late modern period. Notorious among the English attainders by Act of Parliament was that of Thomas Wentworth, Earl of Strafford, most faithful counsellor of Charles I, in 1641 (see note 51 *infra*) on the ground that he had endeavored "to subvert the ancient fundamental Laws and Government." 17 Car. I. *DeLolme on the Constitution* (1838 ed.) Vol. I, p. 400; Hume, *History of England* (Brewer ed. 1880) pp. 183 *et seq.*; Medley, *supra*, p. 167; Feilden, Henry, *Constitutional History of England* (4th ed. rev. 1911) p. 153. Similarly in 1645 a preliminary impeachment against Archbishop Laud was converted into an attainder for attempting to alter the religion and fundamental laws of the realm. Howell, *State Trials*, Vol. IV, 598, 599. See Feilden, *ibid*; Medley, *ibid*. See also Hallam's discussion of the origin of the idea of constructive treason. *Constitutional History of England*. (Henry VIII through Geo. III) (5th ed. 1870) p. 576n. In 1715, the "Jacobite" Lords Bolingbroke and Ormond were impeached for acts prejudicial to the national welfare, *i. e.*, their share in the peace of Utrecht, and later attainted on failing to surrender. 1 Geo. I, cc. 16, 17. Howell, *State Trials*, Vol. XV, 1002, 1012. See, Feilden, *supra*, p. 156; also, note 36 *supra*.

[45] Wooddeson states (p. 638) that so far as the punishment is concerned, bills of attainder are characterized by "making therein some innovation, or creating some forfeiture or disability, not incurred in the ordinary course of law, and which are called *bills of pains and penalties*." Statutes of this kind were passed in practically every state during the Revolutionary period. See note 52 *infra*.

scribed by Section 304. No law or rule prescribed permanent disqualification from office as a penalty: no court could give that judgment—except, of course, the Senate after a verdict of guilty in an impeachment proceeding. But even the Senate, presumably, could not have imposed the unique punishment finally evolved in Section 304—a conditional ban, contingent on future presidential and Senate action. *That* punishment, the punishment to which respondents were subjected, is unique, evolved by the political necessity of obtaining Senate concurrence.

We should add, though it is obvious, that the conditional nature of the punishment imposed does not render it any the less punishment in the constitutional sense. As the Supreme Court stated in the *Cummings* case (4 Wall. at p. 324): "These bills [of attainder] may inflict punishment absolutely, or may inflict it conditionally." See Wooddeson, *supra*, p. 626[46] Moreover, in Section 304, the condition was one over which respondents had no control whatever. That respondents might not have been banned does not materially change the essential character, or the severity, of the proscription of Section 304.

4. Bills of attainder are legislative punishments "* * * without judicial trial."

No one will seriously contend that respondents, before the verdict of guilty was reached by the Kerr Committee, or by Congress, had a "judicial trial." Congress, under the Constitution, may not exercise "judicial" powers; the separation of powers implicit in our constitutional framework

[46] In *Gaines* v. *Buford*, 1 Dana 481 (Ky.) the Court stated (p. 510): "A British Act of Parliament might declare, that if certain individuals, or a class of individuals, failed to do a given act by a named day, they should be deemed to be, and treated as convicted felons or traitors. Such an act comes precisely within the definition of a bill of attainder * * *." The Virginia bill of attainder referred to in note 37 *supra*, was conditional in form.

necessarily restricts that power to the judiciary. *Cf. Merrill* v. *Sherburne*, 1 N. H. 199; *G. & D. Taylor & Co.* v. *Place*, 4 R. I. 324; *Pope* v. *United States*, 323 U. S. 1. See also pp. 44-46, *supra*. Even when exercising its carefully limited power to sit as a court of impeachment, the Senate does not accord the accused a "judicial" trial. It is still a "legislative" trial, proceeding according to the parliamentary law of impeachments, even though every effort may be made to conform to judicial action at its highest and best. Story, *supra*, Secs. 688, 766, 797; Kent, *Commentaries on American Law* (12th ed. 1884) p. *343n.(b); *The Federalist*, No. 65 (1802 ed.) Vol. II, p. 123; Coke, *supra*, pp. 14, 37; Wooddeson, *Law Lectures*, No. 40, pp. 611, 620.[47]

Yet this Court has not left the phrase "without a judicial trial" an undefined negative; the inevitable character of those other proceedings which do *not* constitute a judicial trial were tersely described in the *Cummings* case (4 Wall. at p. 323):

> * * * the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the textbooks, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether comformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense.[48]

That Section 304 lacked any elements of a judicial trial is, as we have stated, scarcely open to question; indeed, the

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[47] Jefferson's *Manual of Parliamentary Practice*, composed originally for use in the Senate of the United States, contains a section on impeachments (1858 ed., pp. 112-117), based on such English sources as Wooddeson's *Law Lectures*, Seldon's *Judicature in Parliament*, Grey's *Debates*, Hale's *Jurisdiction of Parliament*.

[48] The dissent in the *Cummings* and *Garland* cases agreed as to this characteristic of a bill of attainder: "They were convictions and sentences pronounced by the legislative department of the government, instead of the judicial" (4 Wall. at p. 388).

description of the *Cummings* case just quoted might aptly be applied to the proceedings of the Kerr Committee. We set out in detail below, pp. 138-150, the respects in which Section 304 denied to the plaintiffs the safeguards accorded them by judicial due process; and it is obvious that many of them were lacking. But perhaps an equally significant feature, closely related to that which we are now discussing, is the assumption by the Kerr Committee of the power to determine for itself the rules of evidence which should govern. This was a well known characteristic of bills of attainder in English history; when ordinary rules of evidence would not permit a conviction, a bill of attainder was a convenient way in which to avoid them entirely. See Wooddeson, *Law Lectures*, pp. 633 *et seq.*; Miller, *Lectures on the Constitution of the United States* (1893) p. 584; Medley, *English Constitutional History* (6th ed. rev. 1925), p. 166. Again, the dissenting judges in the test oath cases agreed: a characteristic of bills of attainder, they stated, was that "no recognized rules of evidence governed the inquiry." 4 Wall. at p. 388. See also Story, *supra*, Sec. 1344.

Perhaps it may be elaboration of the obvious, but a brief examination of the difference between bills of attainder and impeachments in English practice, will highlight the meaning of the phrase which describes the mode of proceeding expressly rejected by the Framers, in contrast with that which was expressly adopted. Certainly it will show even more clearly the characteristic of Section 304 as a bill of attainder. Both methods, of course, were available to Parliament when it wished to terminate the political, or social, position of an official or other person unpopular with its members.[49] When the acts committed were within the

[49] Wooddeson, *Law Lectures*, Nos. 40 and 41; May, Sir Thomas, *Law and Usage of Parliament* (12th ed. 1917) pp. 56, 594; Hale, *Jurisdiction of the House of Lords* (1796 ed.) Ch. 16; Holdsworth, *History of English Law* (3d ed. 1922) Vol. I, pp. 381-382, Vol. II, p. 451, Vol. VI, p. 260; Keir, D. L., *Constitutional History of Mod-*

established law of high crimes and misdemeanors (the generic name for impeachable offenses),[50] when the evidence at hand was adequate to convict after a hearing, when the punishment was considered sufficiently drastic, and when the Commons were not in a hurry, impeachment was used. Adams, *supra;* pp. 228, 280. When, on the other hand, Parliament wished to punish individuals under circumstances which might require innovations in the nature of the offense, the quantum or nature of evidence, or the severity of the punishment, it did so by a bill of attainder or of pains and penalties. Wooddeson, *supra,* pp. 596, 621, 624, 638-640; Blackstone, *supra,* Bk. IV, p. *259; Anson, *supra,* Vol. I, pp. 384, 388; West, Richard, *Discourse Concerning Treasons and Bills of Attainder* (1716) pp. 23, 93.[51]

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ern England (1485-1939) (1943) p. 160; Stephens, *Commentaries on the Laws of England* (13th ed. 1899) Vol. IV, pp. 258 *et seq.*

Impeachment, as a separate device, seems to have evolved near the close of the 14th Century. In 1399, at the suggestion of the Commons, it was declared that the Commons had no share in the judicial functions of Parliament, but were only petitioners. Creasy, *op. cit. supra* note 44, p. 252; *Ridge's Constitutional Law of England* (Keith, 7th ed. 1939) p. 244n.

[50] Foster, *Commentaries on the Constitution of the United States* (1896) p. 586. See, also, Lawrence, William, *A Brief of the Authorities upon the Law of Impeachable Crimes and Misdemeanors* (Government Printing Office, 1868) pp. 5 *et seq.* (brief prepared as part of the opening argument for the Managers of the House on the Impeachment of President Johnson); and Simpson, Alex, *A Treatise on Federal Impeachments* (1916) pp. 30-49.

[51] The bill of attainder against Sir John Fenwick in 1696 (8 & 9 Wm. III. c. 4), for which there was a deficiency of legal proof, and that against Lord Clarendon in 1667 (19 Car. II. c. 10), in which the penalty imposed was greater than that under established law, are illustrative. Howell, *State Trials,* Vol. XIII, 712, 755; Vol. VI, 391; Wooddeson, *op. cit.,* pp. 638-640. It was common practice during the reigns of the Tudors to pass bills of attainder or pains and penalties without the victims being heard in their defense or examination of witnesses. *E. g.,* Countess of Salisbury, Earl of Essex, and others (Howell, *State Trials,* Vol. I, 434;

The contrast between Section 304 and impeachments, and the parallel between that Section and bills of attainder, need no further elaboration. The Kerr Committee was certainly creating a new offense: "subversive activity", its Report admits, "has not been defined by the courts or by Congress, and your committee must necessarily undertake a definition" (H. Rep. No. 448, *supra*, p. 5). Its definition, in fact, could bring almost anyone within the ambit of the offense. The Kerr Committee, and Congress, certainly did not purport to follow accepted rules of evidence, or of procedure—either parliamentary or judicial; the hearings were secret, and even the nature of the evidence upon which the Committee acted, and the identity of the opposing witnesses, were undisclosed, to cite but a few examples. The punishment meted out was one created for the occasion, as we have already pointed out, *supra*, p. 128. The House of Representatives purported to exercise, with the Senate, "judicial magistracy". In short, by the proceedings of the Kerr Committee and by Section 304 full advantage was taken of the great convenience which, in former days, had attended the device of bills of attainder—the conviction and punishment of individuals without the necessity of the formality or safeguards of judicial trials.

It was, indeed, precisely those characteristics which caused the universal condemnation of the device. Story, for example, in describing this aspect of legislative judicature, stated (*Commentaries*, Sec. 1344):

De Lolme, *op. cit. supra* note 44, Vol. I, pp. 164-167); also, Sir Thomas More and Bishop Fisher (26 Hen. VIII, cc. 1, 2, 13; Howell, *State Trials*, Vol. I, 385, 395). See Reeves, *History of the English Law* (3d ed. 1814) Vol. IV, pp. 406 *et seq.* Indeed, the Commons have used bills of attainder after an impeachment had been attempted, and had failed because the crime charged was not within established parliamentary law of high crimes and misdemeanors. The proceedings against the Earl of Strafford furnish the outstanding example. Howell, *State Trials*, Vol. III, 1235, 514, 518. See, Wooddeson, *op. cit.*, pp. 629-633. See also note 44, *supra*.

> In such cases, the legislature assumes judicial magistracy, pronouncing upon the guilt of the party without any of the common forms and guards of trial, and satisfying itself with proofs, when such proofs are within its reach, whether they are conformable to the rules of evidence or not. In short, in all such cases, the legislature exercises the highest power of sovereignty, and, what may be properly deemed an irresponsible despotic discretion, being governed solely by what it deems political necessity or expediency and too often under the influence of unreasonable fears, or unfounded suspicions. * * * The punishment has often been inflicted without calling upon the party accused to answer, or without even the formality of proof; and sometimes, because the law, in its ordinary course of proceedings, would acquit the offender.

And, even in England, where no higher bar exists against such acts than that imposed by Parliament itself, their dominant features have caused them to fall into total disuse. The condemnation of Wooddeson, delivered in 1777, is characteristic (*supra*, pp. 641-645):

> Bills of attainder for treason, notwithstanding their plausible pretences, have offended the general humanity of this nation, and have been remarked to roll, like Sisyphus's stone, on the promoters. The natural justice of such bills has been inferred from many arguments, the principal of which I shall allude to, and shall cursorily consider their weight, without affecting to determine so important and serious a question. These advocates * * * conclude, that whoever is convinced in his conscience, whether by evidence legally admissible or otherwise, that the accused person is guilty, ought to give his consent to a bill of attainder and that, upon the whole, when it is the act of the Supreme power, whoever deserves to die dies justly.
>
> On these reasons I shall first premise an observation before intimated, that it is very difficult to ascertain the just foundation, measure, and limit of punishment in a supposed state of nature, and that little progress has been made in this inquiry by the great masters of general jurisprudence.—But whatever just power, of not only repelling, but of preventing or punishing,

wrong by extemporaneous methods, individuals might possess in such ideal state, this can hardly extend to authorise the infliction of occasional punishments by the rulers of society.—All civil magistracies have in reason their appointed province. The legislative ought not to intrench on the judicial. Legislation, as it is the noblest exertion of human sovereignty, is the hardest task of human wisdom; and should not be perplexed by such temporary considerations or conjunctures as might hazard impartiality of decision. Hence the political congruity of first enacting laws, and then inforcing them on subsequent occasions, and by different magistrates, has been confirmed by the very constant usage of the world; in the observance of which, the subjects of every state have been thought deeply interested. Thus when a *general* law is made restraining crimes, the due application of it is a new field to exercise the faculties of our minds. To do the whole at once is relying too much on our judgments, especially when the various passions are heated or alarmed by an interesting crisis. Such is not the time practically to overturn legal institutions, which have either been sanctioned by long tradition and experience, or were dictated by temperate reflexion and having universality for their object, were uninfluenced by present fears, and personal enmity or favor.

The defence of bills of attainder relies much on the supposition of what is rarely true, and still more rarely can be proved, as it ought, tho true, that the safety of the state essentially depends on the death of the particular offender. What traitor, when discovered, can be so formidable? what people so insecure? • • • •

We submit, therefore, that Section 304 is a bill of attainder within the meaning of the constitutional prohibition. Every feature is present which was held requisite in the *Cummings* and *Garland* cases—indeed almost every element which was thought requisite by the dissenting judges in those cases.[52]

[52] The only element mentioned by the dissent which is here absent is the corruption of blood (4 Wall. at p. 387). There is no warrant in English or American precedents, however, for considering this

C. THE HISTORY OF SIMILAR RIDERS IN CONGRESS CONDEMNS SECTION 304 AS A BILL OF ATTAINDER.

We recognize that to assert that an act of Congress is void as a bill of attainder may appear to be an attempt to resurrect a dead epoch in history. Happily, few statutes enacted since the adoption of the Constitution have been subject to this vice. In one aspect, however, it becomes even more important that there be, now, no recurrence of such practices, and that the members of Congress who opposed Section 304, and similar bills, on this among other grounds, be sustained by the solemn judgment of the courts. For there have been recent instances, as we have already noted, in which bills such as this have been proposed; and until Section 304 was enacted, the objection that they were

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a *sine qua non* of those "bills of attainder" known as bills of pains and penalties. A judgment of death was necessary to attaint and the consequences of attainder were forfeiture and corruption of blood. Blackstone, *Commentaries* (3d ed. 1884) Bk. IV, pp. *380 *et seq.*; Coke, *First Institute* (on Littleton) (Thomas ed. 1818) Vol. III, pp. 559, 563, 565. But if the judgment was less than death, there was no attaint, and only lesser punishment, denominated pains and penalties, was inflicted. Such punishments, Blackstone recognized, could vary widely, affecting persons or property (Blackstone, *supra*, p. *377):

> Some punishments consist in exile or banishment, by abjuration of the realm, or transportation: others in loss of liberty, by perpetual or temporary imprisonment. Some extend to confiscation, by forfeiture of lands, or movables, or both, or of the profits of lands for life: others induce a disability, of holding offices or employments, being heirs, executors, and the like. Some, though rarely, occasion a mutilation or dismembering. * * *. Some are merely pecuniary, by stated or discretionary fines: and lastly, there are others that consist principally in their ignominy, though most of them are mixed with some degree of corporal pain: * * *

This generic identity yet recognized difference between bills of attainder and bills of pains and penalties is implicit in the statement of Chief Justice Marshall in *Fletcher* v. *Peck*, 6 Cranch 87, 138:

bills of attainder has always been among the arguments which prevailed to ensure their defeat.

We have already noted, at pp. 104-109, *supra*, the instances in which attempts were made to secure the enactment of bills similar to but far less sweeping than Section 304. Without repeating the circumstances of each case, it will suffice here to notice the arguments made in Congress in opposition to these proposed statutes because they were bills of attainder. In the first such attempt, that involving Major

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"A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both." An example of an English bill of pains and penalties is one enacted in 1661 (13 Car. II. c. 15) against a group of persons who had been excepted from Charles II's "Act of Free, and general Pardon, etc." It recited their punishment to be:

> * * * all of them excepted out of the said Act, and reserv'd for future Pains, Penalties and Forfeitures, not extending to Life: * * * It is therefore Enacted, That all and every the Manors, Lands, etc. * * * shall be forfeited to his Majesty * * * And * * * shall be and are hereby degraded from and made uncapable of all and every the Titles of Honour, Dignities, and Preheminences, which they or any of them now have, or which at any time hereafter may descend unto them: * * * but shall be forever reputed, and are hereby declared to be Persons of Dishonour and Infamy.

Reasonableness of Parliamentary Proceedings by Attainder, etc., op. cit., p. 35. See also bill of pains and penalties directed at Sir Francis Atterbury in 1722, *supra* notes 36 and 44.

Practically all of the American precedents are bills of pains and penalties, inflicting such punishments as forfeiture, banishment, disfranchisement, disqualification from holding office (Delaware, Act of June 26, 1778), close imprisonment, and the like. In New York an Act of Disfranchisement (1779) was passed by which "voluntarily remaining in a country overrun by the enemy", an act perfectly innocent when done, was made penal. Only in New York does it appear that capital punishment was inflicted on Loyalists by an act of legislative judicature. See Thompson, *Anti-Loyalist Legislation During the American Revolution* (1908) 3 Ill. L. Rev. 81, 153 *et passim*, and John C. Hamilton, *op. cit. supra* note 38, Vol. III, pp. 23-40.

Cresson in 1924, Mr. Tucker, of Virginia, stated (*Cong. Rec.*, Vol. 65, p. 5033):

> Mr. Chairman and gentlemen, I know nothing in the world about this case or about this officer. I do not know his name, but this is certainly one of the most remarkable propositions, I think, that ever was presented to this House. The legislative power of this Congress, Mr. Chairman, is practically unlimited, and yet there is a limitation upon it, for the Constitution declares that no bill of attainder shall be passed.
>
> * * * * *
>
> The Constitution declares specifically that no bill of attainder can be passed. What is a bill of attainder? It is a legislative act prescribing punishment without judicial trial. This man may be as guilty as Judas Iscariot, but he is entitled to a trial. Why, gentlemen, the hornbooks teach this doctrine so plainly and simply that I really was anxious to have this matter discussed on the other side before I appeared.
>
> This is no new proposition. The two old cases of Ex parte Garland and Cummings against Missouri, both in fourth Wallace, United States Report, followed by innumerable cases, hold that you can not by a legislative act punish a man without a judicial trial.
>
> Gentlemen sometimes wonder why we have a Constitution, and laugh at it. Thank God, we have written that principle in the Constitution of my country.
>
> * * * * * *
>
> Mr. Chairman, I did not rise to go into this discussion, but merely to call attention to a primary, fundamental principle that every boy down in Virginia knows, and if such a provision were to go through this House as this is, it would be worthy of the Fiji Islands and not of free America.

See also Mr. Newton of Minnesota (*id.* p. 5042).[53]

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[53] See also the remarks in connection with the bill (H. R. 9766, 76th Cong.) to deport Harry Bridges; *e. g.*, Mr. Hobbs of Alabama (*Cong. Rec.*, Vol. 86, p. 8201); Mr. Havenner of California (*id.* p. 8184); Mr. Leavy of California (*id.* p. 8200); Mr. Coffee of Washington (*id.* pp. 8208-8213). See also the opposition to the

A like objection was urged against the Lasser rider contained in the Emergency Appropriation Act of 1942 (*supra*, pp. 106-109). See, *e.g.*, Mr. Flannagan of Virginia (*Cong. Rec.*, Vol. 87, p. A2984). And Senator Barkley made the same point in his strongly worded denunciation of the Watson rider in May 1942. *Cong Rec.*, Vol. 88, pp. 3997-3998. See also Senator Murdock (*id.* p. 4000). And see the same arguments on Section 304 itself. *E.g.*, Mr. Coffee of Washington (*Cong. Rec.*, Vol. 89, p. 4548); Mr. Ford of California (*id.* p. 4549); Mr. Hobbs of Alabama (*id.* pp. 4597, 5513-5514).

We submit, therefore, that Section 304 must be stricken down as a bill of attainder prohibited by Article I, Section 9, clause 3 of the Constitution. On this ground, too, plaintiffs are entitled to recover.

IV

Section 304 is Unconstitutional Because It Denies Respondents Due Process of Law.

The third fundamental objection to Section 304 is that it denies to the respondents the safeguards and rights guaranteed to them by the due process clause of the Fifth Amendment. Justice Madden, in the court below (R. 46-47), so held.

The objection to Section 304 on this ground is on both the substantive and the procedural level. Substantively, the rider is to be condemned for its obvious discrimination in singling out respondents by name for permanent

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bill expressed by Attorney General Jackson (*Cong. Rec.*, Vol. 86, p. A4155), and by then Solicitor General Biddle (*id.* p. A4184), and the resolution of the American Bar Association condemning it (A. B. A. Rep., Vol. 65, p. 227). The bill passed the House, was reported to the Senate (S. Rep. No. 2031), but was not passed. A similar bill was introduced into the 77th Congress (H. R. 1644) and again passed the House (*Cong. Rec.*, Vol. 87, p. 7675), but was never reported to the Senate.

disqualification for federal employment. Procedurally, the absence of the fundamental safeguards which attended the Kerr Committee, and the entire Congressional proceeding—an absence which is perhaps the inevitable concomitant of any legislative attempt to determine guilt and assess punishment—also condemn the statute.

A. THE DISCRIMINATION APPARENT ON THE FACE OF SECTION 304 RENDERS IT VOID UNDER THE FIFTH AMENDMENT.

Wholly apart from the objections urged in Points II and III, we believe that Section 304 is, on its face, a palpable violation of the due process clause. A statute aimed solely at three persons, specifying them by name, certainly is immediately suspect, and there is nothing present here which justifies any conclusion than that of arbitrary discrimination.

Due process of law, as it is used in the Fifth Amendment, is one of the basic safeguards of the citizen. One of the things which it has always guaranteed is that no particular person should be arbitrarily singled out for legislative action. As the Court said of both the Fourteenth and the Fifth Amendments in *Hurtado* v. *California*, 110 U. S. 516, 535:

> But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. *It must be not a special rule for a particular person or a particular case.*" (Italics supplied.)

Thus even though the Fifth Amendment does not contain, like the Fourteenth Amendment, a clause guaranteeing equal protection of the laws, the courts have recognized not only in the *Hurtado* case, but on many occasions, that discriminatory action which is highly arbitrary and injurious would violate the Fifth Amendment. *Hirabayashi* v.

United States, 320 U. S. 81, 100; *Nichols* v. *Coolidge*, 274 U. S. 531; *Wallace* v. *Currin*, 95 F. (2d) 856, 867 (C. C. A. 4th), *aff'd* 306 U. S. 1; *Minski* v. *United States*, 131 F. (2d) 614, 617 (C. C. A. 6th); *United States* v. *Ballard*, 12 F. Supp. 321, 325-326 (W. D. Ky.).

Undoubtedly, in a *general* law, there is a strong presumption that the legislative classifications are based upon sound reasons—reasons which the courts will not ordinarily question. The power of the legislature to classify individuals into groups is unquestioned, and such classifications may be based on any rational ground—except, of course, those that violate other constitutional limitations. Here, however, the presumption runs the other way. Section 304 sets up no class of persons; it enacts no general law applicable to all who fall within its ambit; it lays down no standards or rules. Section 304 is *individual* legislation, pure and simple. There is no other member of the community, no one except the three respondents who are identified by name in the statute, who is affected by its terms.[54]

Such a law, we submit, is so contrary to our traditions as to be justly subject to the condemnation of the Fifth Amendment. As the court stated in *United States* v. *Ballard*, *supra*:

> Nothing is more repugnant to the American mind than that * * * among fellow citizens there should be one law for one individual and a different law for another * * *. "Due process of law" has been defined many times as meaning the law of the land, and the law of the land implies a general public law, equally binding on every member of the community * * *. Purely arbi-

[54] That Congress might have wished that all persons found guilty of "subversive activity" be similarly proscribed from Government service cannot obscure the fact that it passed no such general law, equally applicable to all, but chose rather to single out individuals by name. A bill which would undertake to remove from office persons found guilty by the courts of "subversive activity" has been introduced in the present Congress (H. R. 1433, 79th Cong., 1st Sess.), but no action has been had on it.

> trary orders directed against individuals or classes are not the law of the land.[55]

Mr. Justice Holmes made the same point in *McFarland v. American Sugar Company*, 241 U. S. 79, in which the challenged statute was not explicitly, but only tacitly, applicable to a particular person. He said (241 U. S. at 86):

> The presumption created here has no relation in experience to general facts. It has no foundation except with tacit reference to the plaintiff. But it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.

But, it was argued on behalf of Congress in the court below, there can be no violation of due process in an appropriation act. Congress, it was said, may appropriate for legal reasons, moral reasons, or no reasons at all, and how much more unlimited must be its power *not* to appropriate, as in Section 304. We have already dealt with a similar argument (pp. 90-99, *supra*) but a word more may be in order. At first blush, one would admit that Congress could refuse to appropriate for reasons or no reasons; because of legal doubts or because of sheer inertia; because the proposed object of its appropriation was already supplied with funds, or because it contained a high proportion of people with red hair. All that is true, of course.

But Section 304 is not a simple refusal to appropriate. As pointed out above (pp. 30-39), the plain purpose and necessary effect of the rider were to remove respondents from office on November 15, 1943, or at least to deprive

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[55] It is significant that under state constitutional provisions guaranteeing due process of law (but, like the Fifth Amendment, without a specific "equal protection of the law" clause) the state courts have also stricken down discriminatory and special legislation. *E. g.*, *Metropolitan Trust Co.* v. *Jones*, 38[illegible] Ill. 248; 51 N. E. (2d) 256; *Sheldon* v. *Hoyne*, 261 Ill. 222, 103 N. E. 1021; *Charles J. Off & Co.* v. *Morehead*, 235 Ill. 40, 85 N. E. 264; *State* ex rel. *Hamby* v. *Cummings*, 166 Tenn. 460, 63 S. W. (2d) 5[illegible]. *Cf. State* ex rel. *Tolerton* v. *Gordon*, 236 Mo. 142, 407, 139 S. W. 403.

them of all substantive right to compensation after that date. In singling out respondents for such punishment, the rider plainly deprives them of property without due process of law. Furthermore, this provision is, in effect, a *permanent* disqualification from public office—a forfeiture of position and reputation as a citizen. Though phrased in terms of limitation on the use of appropriations, it constitutes the imposition of a penalty equal to that which the Senate may impose for conviction upon impeachment, a punishment which will for all time set these three respondents apart from every other citizen in the United States. Respondents are in effect debarred for life from Federal public office. To describe that as a simple failure to appropriate is to close one's eyes to realities.

The matter can be stated in another way. A failure to appropriate is the act of a particular Congress, or a particular session of Congress. An appropriation bill may not pass, or it may pass with a limitation placed in it as to the uses of that particular appropriation. Section 304, however, is *permanent*. So long as it remains unrepealed, Section 304 would, if effective, be a constant limitation on *every* appropriation act of *every* Congress. Can that result, by any reasonable person, be characterized as a simple refusal to appropriate? Certainly not.

We submit, therefore, that on its face Section 304 does not meet the test of due process, as we know it. Senator Barkley summed it up in his statement to the Senate in opposition to this rider (*Cong. Rec.*, Vol. 89, p. 6693):

> I feel that such action by any legislative body outrages all the principles of fair play and democracy, as we think we are now fighting to preserve it in the world.

B. THE PROCEDURE BY WHICH RESPONDENTS WERE CONVICTED ALSO VIOLATES THE FIFTH AMENDMENT

The discrimination apparent in Section 304 is made even more apparent by a brief consideraton of the procedure by which respondents were convicted and punished.

Confessedly, legislative methods cannot be judicial methods. Congressional committees could not function at all if they were bound by the safeguards which are indispensable attributes of courts. Even in impeachment proceedings, where there are many safeguards, this must be true. See pp. 111, 130-131, *supra*.

Yet, when Congress assumes, as in this case, the function of a court, and passes judgment of guilt or innocence on *individuals*, there must, we submit, be *some* standards by which the propriety of its action may be judged; some limits beyond which it may not go consistent with constitutional guarantees. All other considerations aside, the individual who is being judged must have *some* rights of which even legislative judgments cannot deprive him.

We go further. We earnestly believe that Congress cannot, consistent with the due process clause of the Constitution, exercise what, for lack of a better term, we may call the functions of judicature. Legislative *judgment* on matters of policy calls for the utmost in ability, energy and wisdom. Legislative bodies are so organized, and so function, that their combined wisdom, ability and energy may be most effectively marshalled for the task of *creating* legislation—for lawmaking is essentially a *creative* function. But when Congress abandons that function, and essays, in its lawmaking role, to act as a judicial agency, it stands revealed as utterly lacking the facilities necessary to accord to the individual who stands accused the protections which are the hall-mark of our system of law. Whether the act be in terms a bill of attainder or not, legislative "justice", in this sense, exhibits *ex necessitate* all of the features of bills of attainder which by 1789 had made them odious on both sides of the Atlantic.

Dean Pound has stated the case (*Justice According to Law*, 14 Col. L. Rev. 1, 7-11):

> • • • Examining the actual operation of legislative justice in the several cases named, it may be said without hesitation that in action it exhibits all the bad features of justice without law.

In the first place, legislative justice is unequal, uncertain, and capricious. Bills of attainder, even in modern times, were too often merely legislative lynchings, and bills of pains and penalties, of which there were many examples during and immediately after the Revolution, were enacted capriciously, were procured on grounds of ill will in relatively trivial cases as well as in the grave cases involving danger to the commonwealth for which they were supposed to be reserved, and became deservedly odious. * * *

Again, legislative justice in its relatively short history in this country and in the relatively small number of cases in which it was exercised showed the influence of personal solicitation, lobbying and even corruption far beyond anything which even the most bitter opponent of our judicial system has charged against the courts in the course of a long history and after disposition of a huge volume of litigation.

Thirdly, legislative justice has always proved highly susceptible to the influence of passion and prejudice. * * * This feature of legislative justice was one of the chief causes of the odium which attached to acts of attainder and bills of pains and penalties at the end of the eighteenth century * * *

Closely related to the foregoing characteristic of legislative justice is a fourth, namely, the preponderance of purely partisan or political motives as ground of decision. * * *

Finally legislative justice has been disfigured very generally by the practice of participation in argument and decision by many who had not heard all the evidence and participation in the decision by many who had not heard all the arguments. * * *

* * *In sum, legislative justice is uncertain, crude at its best and capricious at its worst, cumbersome and expensive, with no corresponding advantages. Hence from the Twelve Tables to modern constitutions men have agreed in prohibiting it. The provisions of modern constitutions in this respect represent more than the influence of eighteenth-century theory. They represent a universal experience of the ills involved in legislative justice.

We do not mean to state, or to imply, that the Kerr Committee was actuated by improper motives, or that it did not accord respondents in terms of customary *legislative*, lawmaking procedures, those privileges which it deemed consonant with getting a result. Many of the characteristics of the Kerr Committee hearings which we notice below, such as its executive sessions, the evidence not of record, the summary and partial report to the Congress, may well be proper conduct of *legislative* business. What we do say, however, is that when Congress undertook to act as judge and jury in the cases of these individuals, those same procedures become so unfair and so arbitrary as to require the conclusion that they are not due process of law.

The first instance of such procedural unfairness is in the notice of the hearing afforded respondents. Respondent Lovett was "invited" to appear before a meeting of the Committee on April 15, 1943, by a letter handed to him on April 14, 1943 (R. 21)—some 24 hours of notice for preparation to meet a charge so grave as to be almost tantamount to treason. Respondent Watson was similarly "invited" by letter dated April 7, 1943, presumably delivered to him on April 8, to appear in person before the Committee on April 9 (R. 26). We do not have the dates in the case of respondent Dodd but the timing was presumably similar.[56] In a court of law, such procedures would not sustain a minor fine. *Cf. Roller v. Holly*, 176 U. S. 398, 408-410.

The timing of the notice to appear before the Committee made little more than a hollow gesture the advice in the notice to respondents Lovett and Watson that if they were unacquainted with "the charges and allegations concerning [them] a copy would be furnished upon request" (R. 21, 26. See Rule 4 of the Committee). Neither of these

[56] Although respondents were not subpoenaed, the "invitation" was stated in mandatory language—"you are instructed to appear at Room 449 * * *" (R. 26). See Rule 4 of the Committee.

respondents attempted to secure copies of the charges (R. 21, 27), since obviously, in the few hours available to them, they would have been useless.[57] In the case of respondent Dodd, however, the Committee did not even follow its own rules. He was *not* advised that copies of the charges against him would be furnished on request (*Cf.* R. 31 and R. 27), as required by Committee Rule 4. And more than that, when he nevertheless attempted to secure some information from the Committee along this line, he was informed by the Committee that it had formulated no charges of any sort against him (R. 30).[58]

The nature of the hearings themselves is further illustration of the unfairness of the procedure. The Rules of Procedure adopted by the Committee on March 23, 1943 (R. 20)—well *before* the hearings began—were unknown to the respondents when they appeared, since they were first made public on June 2, 1943, after the hearing had been concluded (*ibid.*). All of the proceedings were in "executive"—*i.e.*, secret—sessions (R. 21, 26, 30. See Committee Rule No. 1).[59] Each of the respondents appeared alone before the Committee, it having been decided by the Committee that respondents would be heard "without any persons other than the Subcommittee, its staff, and the witness being present" (R. 21, 27, 30-31). Both the General Counsel of the Federal Communications Commission and the Solicitor of the Department of the Interior, who wished to

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[57] The same comment is applicable to the fact that each respondent "was given *at the hearing* full opportunity to make any statements or explanations he desired" (R. 21, 27, 31).

[58] *Cf.* Constitution, Amendment VI, requiring that an accused shall "be informed of the nature and cause of the accusation;" *Morgan* v. *United States*, 304 U. S. 1, 18, 19, 25; *Lipke* v. *Lederer*, 259 U. S. 557, 562; *United States* v. *Cohen Grocery Co.*, 255 U. S. 81; *United States* v. *Cruikshank*, 92 U. S. 542, 558.

[59] *Cf.* Amendment VI, requiring a "public trial"; *Gaines* v. *Washington*, 277 U. S. 81; *Snyder* v. *Massachusetts*, 291 U. S. 97, 106; *Davis* v. *United States*, 247 Fed. 394 (C. C. A. 8th).

be present only as observers, were denied permission to accompany the respondents (R. 21, 27, 30-31).[60]

Respondents were not, even at this hearing, apprised of the evidence against them, or of the nature or identity of their accusers.[61] Rule 3 of the Committee's Rules indicates that the Committee itself would—

> proceed to collect and review all of the reports of the several committees and the reports of investigations made by the Federal Bureau of Investigation together with such transcripts of evidence as may be available from the several investigating committees, and prepare a digest or memorandum of each individual case for the aid of the committee and for use at such time as the person charged shall appear for Examination.

None of this material was exhibited to the respondents when they appeared, except that the "charges" made by the Committee on Un-American Activities were shown to respondents Lovett and Watson, but not Dodd (R. 21, 27, 30). As the findings state (*e.g.*, R. 21), except for these charges, and the respondents' testimony—

> The evidence and other materials gathered during the course of prior investigations by the Federal Bureau of Investigation, by the Committee on Un-American Activities, and by others, which were considered by the Sub-Committee in connection with plaintiffs' case, were and are confidential. * * *

Indeed, this evidence is unknown, even now, not only to respondents but also to the Congress which voted Section 304. Respondents were found guilty, in other words, upon evidence known only to some of their judges—evidence which they obviously could neither question nor rebut. *Cf.*

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[60] *Cf.*, Amendment VI, providing that the accused shall "have the Assistance of Counsel for his defense"; *Glasser* v. *United States*, 315 U. S. 60; *Johnson* v. *Zerbst*, 304 U. S. 458.

[61] *Cf. Motes* v. *United States*, 178 U. S. 458, 467 *et seq.*; *Kirby* v. *United States*, 174 U. S. 47, 55 *et seq.*

Interstate Commerce Commission v. *Louisville & Nashville R.R.*, 227 U. S. 88, 93-94; *Ohio Bell Tel. Co.* v. *Public Utilities Comm.*, 301 U. S. 292, 302-303.[62]

A word is warranted with respect to the remarks of the respondents at the close of their respective hearings. Respondent Dodd was asked by Mr. Keefe, a member of the Committee, whether he had been "fairly and reasonably treated by this committee" and he replied in the affirmative (*Kerr Hearings, supra*, p. 157). Respondents Lovett and Watson made no protest to the Committee about its procedures. Yet these are simply the inevitable consequences of legislative justice—the accused do not antagonize their judges. The Committee did not, of course, act other than courteously to these respondents, and the hearings, except as to respondent Dodd, were within the scope of the procedure which the Committee evolved for itself. But certainly no waiver, or indeed no real evidentiary significance, can be attached to the failure of the respondents to protest. Circumstances made protests not only obviously unavailing, but wholly impossible.

Finally, the total inapplicability of legislative processes to the trial of individuals is revealed by the manner in which Congress, as a whole, acted upon the Kerr Committee findings. The original plan seems to have been for the Kerr Committee to serve as a "jury", and submit to Congress nothing but its summary report. See Rep. Keefe, *Cong. Rec.*, Vol. 89, p. 4600. *Cf. Morgan* v. *United States*, 298 U. S. 468, 480, 481. This, alone, was available to members of the House when they first voted on Section 304.

[62] There is no question that this evidence is part of the "record" in their cases. Rule 6 of the Committee provides specifically: "all reports of the several committees and the investigations made by the Federal Bureau of Investigation, together with such transcripts of evidence as are made available from the several investigating committees, and all letters, resolutions and other data bearing upon each individual case will be treated as a part of the evidence and record in each particular case."

since even the transcript of the testimony of the respondents, and the other material in *Kerr Hearings, supra*, were not printed until about June 30, 1943. See *Cong. Rec.*, Vol. 89, p. 7008. But even when Senate pressure forced the abandonment of this procedure, and this document was printed, the "record" thus prepared was wholly inadequate. In particular, it omitted *every bit of evidence* which the Kerr Committee had received *in favor* of the respondents (R. 21, 27, 30). Thus even a member of Congress who wished, in the very short time available between the printing of the *Kerr Hearings, supra*, and the final vote on the rider, to determine for himself the facts upon which he was being called to act, would have found the *Hearings* a biased and admittedly one-sided picture of the "record".

Again, it may be argued that a removal from a Government position, by the President for example, need not, to be constitutional, accord the one removed a hearing, or witnesses in his defense, or any other procedures whatever, and that consequently a legislative removal may likewise omit any such protection. The answer is the same as that which we have already made (pp. 141-142)—Section 304 is *not* a simple removal; it is the imposition of the drastic punishment of a permanent ban on gainful Federal employment. Certainly *such* punishment cannot be decreed by a judicial tribunal, as for treason, or by the Senate, as for high crimes and misdemeanors, without recognized safeguards. The same safeguards should be requisite when Congress undertakes to apply the same punishment.[63]

One can only conclude that Dean Pound's analysis of "legislative justice" is a statement of its inevitable characteristics. Legislative bodies cannot, consistently with

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[63] Compare the statement in President Johnson's veto of certain reconstruction legislation (Richardson, *Messages and Papers of the Presidents*, Vol. VI, p. 503), cited in *Duncan* v. *Kahanamoku*, Nos. 14, 15, October Term 1945: "We have no right to do in one place more than in another that which the Constitution says we shall not do at all."

fundamental principles, conduct inquisitions, decide guilt, and mete out punishment. When they attempt to do so, they necessarily subject their acts to comparison with those procedures which resulted in the universal denunciation of bills of attainder. What we are attempting to say was said over 150 years ago by Wooddeson in his *Law Lectures* (p. 643):

> All civil magistracies have in reason their appointed province. The legislative ought not to entrench on the judicial. Legislation, as it is the noblest exertion of human sovereignty, is the hardest task of human wisdom; and should not be perplexed by such temporary considerations or conjectures as might hazard impartiality of decision. Hence the political congruity of first enacting laws, and then inforcing them on subsequent occasions, and by different magistrates, has been confirmed by the very constant usage of the world • • •

We may also add the recent statement by this Court in *Duncan* v. *Kahanamoku*, Nos. 14, 15, October Term 1945:

> Courts and their procedural safeguards are indispensable to our system of government. They were set up by our founders to protect the liberties they valued. • • • They were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws. Their philosophy has been the people's throughout our history. For that reason we have maintained legislatures chosen by their citizens or representatives and courts and juries to try those who violate legislative enactments. We have always been especially concerned about the potential evil of summary criminal trials and have guarded against them by provisions embodied in the Constitution itself.

We submit, that Section 304, both in its substantive features and in the manner in which it was enacted, and particularly in both combined, falls short of according to these respondents the guarantees of due process. The Section should be held unconstitutional on this basis alone.

CONCLUSION.

Wherefore, Section 304 should be adjudged unconstitutional, and the judgments of the court below allowing recovery to each of the three respondents, should be affirmed.

Respectfully submitted,

EDWARD B. BURLING,
CHARLES A. HORSKY,
AMY RUTH MAHIN,
Counsel for Respondents.

COVINGTON, BURLING, RUBLEE,
ACHESON & SHORB,
Of Counsel.

April, 1946.

APPENDIX.

OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D. C.

March 8, 1943.

Honorable John H. Kerr,
House of Representatives,
Washington, D. C.

My dear Congressman Kerr:

Responding to your request of March 5, 1943, please be advised that the following organizations or groups of organizations have been regarded by this Department as subversive within the legislative mandate of Public Law 135 and Public Law 644, 77th Congress:

1. The Communist Party, U. S. A., and its affiliates.
2. The German-American Bund and its affiliates.
3. The Silver Shirt Legion of America.
4. Certain organizations found to be dominated by enemy governments or organizations. See "Confidential Memorandum to all United States Attorneys," February 2, 1942 (copy enclosed)

With respect to certain other organizations, not regarded as subversive within the meaning of the legislative mandate, it has been found that the evidence of subversive infiltration or control was such as clearly to require that they be brought within the scope of the investigation for administrative purposes. Such organizations, generally described as Communist, Fascist, or Nazi "fronts," have included the following:

1. American League Against War and Fascism (later known as American League for Peace and Democracy).
2. American Patriots, Inc.
3. American Peace Mobilization (later known as American People's Mobilization).
4. American Youth Congress and its affiliates.

5. League of American Writers.
6. National Committee for the Defense of Political Prisoners and National Committee for People's Rights.
7. National Federation for Constitutional Liberties and its affiliates.
8. Protestant War Veterans of the United States, Inc.
9. National Negro Congress and its affiliates.
10. Washington Committee for Democratic Action.
11. Washington Cooperative Bookshop, exclusive of mere patrons or subscribers.

Included also are certain organizations, mentioned in my opinion in the Bridges case (copy enclosed) or elsewhere as follows:

1. All-American Anti-Imperialist League.
2. International Labor Defense.
3. International Workers' Order.
4. Workers' Alliance.

Included also are certain more or less ephemeral organizations, infrequently mentioned in investigative reports, but with respect to which factual data has been made available to departments and agencies through the Interdepartmental Committee. See the Committee's Confidential Memorandum June 10, 1942 (copy enclosed).

The development of interpretations for the guidance of the Federal Bureau of Investigation during the fiscal year 1941-42 is well summarized in the Interdepartmental Committee's Report to me of June 30, 1942, included in my report to the Congress of September 1, 1942. See H. Doc. No. 833, 77th Congress, 2d Session, pp. 18-20.

I note that your request of March 5, 1943, is formulated to include "organizations found to be subversive . . . under any other law." Complete compliance with a request of such scope would of course require a careful review of the Department's prosecutive activities during recent years and would delay my response, presumably without supplying you with information pertinent to the work in which your sub-committee is engaged. For example, our prosecution of "Socialist Workers Party" leaders under the act

of June 28, 1940, in the District Court of the United States for the District of Minnesota, has been based upon evidence disclosing the revolutionary character of this "Trotskyist Group." No Federal employees have been reported as involved at any time, yet we regard the organization as subversive.

It occurs to me that it will be most helpful to you if I respond promptly as above, leaving for consideration in response to special request the occasional organization in which your sub-committee may become interested at some later date. Trusting that this procedure may be found satisfactory, and with assurance of our desire to cooperate,

Sincerely yours,

(Signed) FRANCIS BIDDLE,
Attorney General.

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FILED
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CHARLES ELMORE CROPLEY

Nos. 809-811.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

UNITED STATES, *Petitioner*,

v.

ROBERT MORSS LOVETT.

UNITED STATES, *Petitioner*,

v.

GOODWIN B. WATSON.

UNITED STATES, *Petitioner*,

v.

WILLIAM E. DODD, JR.

BRIEF FOR THE CONGRESS OF THE UNITED STATES IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI

JOHN C. GALL
Special Counsel for
The Congress of the United States
Under House Resolution 386 and Public Law 249
78th Congress

March, 1946.
Southern Building,
Washington, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Opinion below	1
Jurisdiction	2
Statement	2
The Essential Facts	3
Court of Claims Decision	6
Reasons for Granting the Writs	8
Conclusion	13

CITATIONS.

Cases:	
Dunwoody v. *United States*, 143 U. S. 578	10, 11
Embry v. *United States*, 100 U. S. 680-685	11
United States v. *Dickerson*, 310 U. S. 554	10
United States v. *Mitchell*, 109 U. S. 146	10, 11
United States v. *Vultee*, 283 U. S. 509	10
Statutes and Resolutions:	
Public Law 132, 78th Cong.	2, 4
Public Law 249, 78th Cong.	2
16 Stat. at L.	6
36 Stat. 1135	6
47 USC 154 (f) (g)	4, 10
48 USC 1405 (v)	5, 10
H. Res. 105, 78th Cong.	3
H. Res. 386, 78th Cong.	2
Congressional Documents:	
H. Rept. 448, 78th Cong.	9
H. Rept. 593, 78th Cong.	9
H. Rept. 607, 78th Cong.	9
H. Rept. 618, 78th Cong.	9
H. Rept. 661, 78th Cong.	9
H. Rept. 1117, 78th Cong.	2
H. R. 2714, 78th Cong.	9
S. Doc. 133, 79th Cong.	6
S. Rept. 724, 78th Cong.	2

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BRIEF FOR THE CONGRESS OF THE UNITED STATES IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI

I.

OPINION BELOW.

The opinion of the Court of Claims entered in the above-captioned cases on November 5, 1945, has not been officially reported.

II.

JURISDICTION.

The petition herein sets forth the statute under which the jurisdiction of this Court is invoked.

III.

STATEMENT.

The Congress of the United States submits this brief in support of a petition filed by the Solicitor General on behalf of the United States for writs of certiorari to review the decision of the Court of Claims in the above cases.

On December 6, 1943, respondents having filed petitions in the Court of Claims, the Attorney General advised the Congress, *inter alia*, that he found it impossible to advocate the views of the Congress with conviction and that the Congress should be afforded an opportunity to be represented by its own counsel.[1]

Special Counsel for the Congress filed a brief and argued these cases in the lower court pursuant to House Resolution 386[2] and Public Law 249[3] adopted in order that counsel

> "be permitted to defend the action of the Congress in enacting Section 304 of Public Law 132."[4]

The Court of Claims recognized counsel from the Department of Justice "for the Attorney General," (R. 18) and noted that

> "The Attorney General having heretofore . . . taken the position that the section was unconstitutional, and still adhering to that position, the Assistant Attorney

---

[1] The Attorney General also referred to the President's opinion that the challenged section was unconstitutional. See H. Rept. 1117, 78th Cong., 1st Sess., Com. on Judiciary.

[2] 78th Cong., 1st Sess.

[3] 78th Cong., 2d Sess.

[4] Sen. Rept. 724, 78th Cong., 2d Sess., Com. on Judiciary.

General, appearing for the defendants, supports the plaintiffs." (R. 34)

The Essential Facts.

The Court of Claims, upon stipulated facts, made special findings of fact, which are reported as a part of its judgments in these cases. (R. 19) For the purpose of this brief, the facts are, briefly, as follows:

Following certain Congressional inquiries and investigations made by several Government agencies, including the Federal Bureau of Investigation, the House of Representatives created a special subcommittee of the Committee on Appropriations (hereinafter referred to as the "Kerr Subcommittee")

> "to examine into any and all allegations or charges"

with respect to subversive activities on the part of certain

> "persons in the employ of the several executive departments and other executive agencies . . . with the view of obtaining all available evidence bearing on each particular case and reporting to the House the conclusions of the Committee with respect to each case in the light of the factual evidence obtained." (H. Res. 105, 78th Cong.)

Various employees, including the respondents, voluntarily appeared before the Kerr Subcommittee; and each of the respondents was given

> "full opportunity to make any statements or explanations he desired with respect to the subject matter of the investigation." (R. 21, 27, 31)

Having examined evidence adduced during investigations made by various executive agencies and the House Committee on Un-American Activities, the Kerr Subcommittee reported its findings to the Committee on Appropriations, which, in turn, recommended to the House of Representa-

tives an amendment to the Urgent Deficiency Appropriations Bill of 1943. Subsequently, the amendment was enacted as Section 304 of Public Law 132, approved July 12, 1943, and provides:

> "Sec 304. No part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act, or (2) which is now, or which is hereafter made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States, shall be used, after November 15, 1943, to pay any part of the salary, or other compensation for the personal services, of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has been appointed by the President, by and with the advice and consent of the Senate: *Provided*, that this section shall not operate to deprive any such person of payment for leaves of absence or salary, or of any refund or reimbursement, which have accrued prior to November 15, 1943; *Provided further*, that this section shall not operate to deprive any such person of payment for services performed as a member of a jury or as a member of the armed forces of the United States nor any benefit, pension, or emolument resulting therefrom." (R. 22.).

Notwithstanding the above statutory notice contained in the Urgent Deficiency Appropriation Act, approved by the President of the United States July 12, 1943, the respondents were permitted by their employing agencies to remain in their positions after November 15, 1943, although none of them was nominated and confirmed in accordance with Section 304. At the time Section 304 became effective, respondents Watson and Dodd were employees of the Federal Communications Commission, having been appointed pursuant to Section 4 of the Federal Communications Act of 1934, which provides, *inter alia*, that

> "The Commission shall have authority, subject to the provisions of the civil-service laws and sections 661 to 674 of Title 5, to appoint such other officers, engineers, accountants, inspectors, attorneys, examiners, and

other employees as are necessary in the execution of its functions . . .

"(g) The Commission may make such expenditures (including expenditures for rent and personal services at the seat of government and elsewhere, for office supplies, law books, periodicals, and books of reference, and for printing and binding) as may be necessary for the execution of the functions vested in the Commission and as from time to time may be appropriated for by Congress . . ." *47 U. S. C. 154 (f), (g)*

Respondent Lovett occupied the position of Executive Assistant to the Governor of the Virgin Islands, having been appointed under Section 23 of the Act of June 22, 1936, which provides:

"The Secretary of the Interior shall appoint such other executive and administrative officers as may in his discretion, be required . . . The salary of all executive officers and employees appointed . . . by the Secretary of the Interior shall be paid from funds appropriated for the Government of the Virgin Islands by the Congress in annual appropriation bills, or as may be otherwise provided by law . . ." *48 U. S. C. 1405(c)*

Respondent Watson resigned his position May 21, 1944 (Watson, Fdgs. 3, R. 24, 25); Dodd remained as an employee through November 21, 1943 (Dodd, Fdgs. 3, R. 30); Respondent Lovett continued as a federal employee until he resigned March 13, 1944 (Lovett, Fdgs. 3, R. 19, 20).

On December 6, 1944, each of the respondents filed petitions in the Court of Claims to recover compensation equivalent to salary for services rendered after November 15, 1943, alleging a demand for payment thereof and a refusal because of Section 304

"and the fact that the President did not appoint him thereunder."

The court below considered the three cases together and gave judgments for the then plaintiffs, which judgments the Court said

"may be satisfied by any appropriation out of which judgments may be by Act of Congress payable." (R. 40)

Congress has not made any appropriation out of which these judgments can be paid.[5]

Court of Claims Decision.

The Court of Claims concluded that Section 304 did not affect respondents' right to compensation for services performed after November 15, 1943. The decision was based upon several premises summarized by the Court of Claims as follows:

"The statute did not separate the plaintiffs from office, it did not take away the salary of that office, it did not prohibit plaintiffs from receiving their salaries. The Act did provide an appropriation for the payment of their salaries. The appropriation for the pay period was there, but it was not made use of. The plaintiffs were appointed lawfully, they continued in office lawfully. Section 304 is [in] no way disqualified them, and we can find no rational basis for construing the Act otherwise than as a mere stoppage of disbursing routine, nothing more. To construe it as something more is to volunteer inferences. Whether the Congress had the constitutional authority to stop payment, within the limitations of the Act, is immaterial. That which is material is that the salaries have not been paid, that the obligation was never destroyed, and that the obligation continue to this day." (R. 40, 41)

The cornerstone of the Court's reasoning is its assumption that after November 15, 1943, the respondents validly occupied offices to which compensation had been affixed and which compensation Congress could not prospectively deny

[5] On January 17, 1946, the Court of Claims reported to the Congress, *inter alia*, that it had rendered judgments in favor of respondents. The Court's report (S. Doc. 133, 79th Cong.) furnished a synopsis of the nature of the claims in compliance with Section 143 of the Act of March 3, 1911 (36 Stat. 1135).

except by abolishing the office, by removing salary from the office or by removing the incumbent. At various points in its opinion the Court emphasized that in these cases Congress did none of these things, stating:

> "There was no removal of the officer from the office, no removal of the salary from the office." (R. 37)
> "Granted that an appropriation act may be something more than an accounting process, in the case we have here Section 304 makes no attempt to change or do away with compensation attached to the offices held by the plaintiffs." (R. 39, 40)
> "The statute did not separate the plaintiffs from office, it did not take away the salary of that office, it did not prohibit the plaintiffs from receiving their salaries." (R. 40)

Upon that premise the Court supported its finding that Section 304 did not limit the appropriations available to pay respondents' salaries, but "merely stopped payment in three specific instances . . . regardless of obligation." (R. 40)

The Court's finding that the provision was a bare caveat issued against disbursing officers and was not intended to deny pecuniary obligations in a large measure resulted from its assumption that compensation was not removed from the offices held by the respondents and that Section 304, by merely denying payment to the respondents did not affect their rights to the compensation of the offices they held.

Because of that construction the Court concluded that, "It is immaterial whether Section 304 of the Urgent Deficiency Appropriation Act, 1943, or any part thereof is constitutional or not. We do not decide that question. The plaintiffs are entitled to recover in either event."

However, three of the judges, in separate concurring opinions, expressed their views that Section 304 is unconstitutional; and it is doubtful whether the apparent conflict between the concurring opinions and the opinion of the Court can be reconciled by the theory that the concurring

opinions were intended as dicta on a point which the judges recognized as unnecessary to the decision.

In his concurring opinion, Mr. Justice Whittaker remarked:

> "I desire to state very briefly the reason for my concurrence in the result reached by the Court." (R. 41)

Mr. Justice Jones said:

> "I concur in the result. The single issue in this case is whether Section 304, as worded, is a valid exercise of the constitutional powers of the Congress". (R. 42)

Mr. Justice Madden, "concurring in the result," clearly indicated that his concurrence resulted from his conviction that the statute was unconstitutional, stating in conclusion that because of the unconstitutionality of the provision "we must disregard Section 304". (R. 48)

The anomalous situation prevails, therefore, in which the Court as an entity found the constitutionality of Section 304 immaterial, while a majority of the Court have indicated their views that the constitutional questions were material and that the statute is unconstitutional.

IV.

REASONS FOR GRANTING THE WRIT.

The confusion resulting from the apparent conflict between the decision of the Court and the separate concurring opinions of the majority of the justices warrants review of these cases. The importance of the issues involved necessitates a conclusive determination regarding the effect and the validity of the action taken by Congress in Section 304 of the Urgent Deficiency Appropriation Act, 1943.

However, even if the concurring opinions be disregarded, the conclusion that Section 304 did not affect respondents' right to compensation should be reviewed.

The petition for writs of certiorari submits as error the holding, "that Section 304 of the Urgent Deficiency Appro-

priation Act, 1943, had not terminated the respondents services but had merely prohibited the disbursing agencies from paying their salaries." (pp. 8, 9) While we concur in the opinion that the Court of Claims erred by holding that Section 304 was a bare caveat issued against the disbursing officers of the Government, we respectfully submit that under the circumstances of these cases office and compensation were not inseparable. The Court of Claims erred, not by finding that Section 304 did not remove respondents, but by concluding that because it did not the respondents acquired a right to compensation for the services performed after November 15, 1943.

The legislative history of the measure, considered in connection with the statutes under which the respondents were appointed, shows that when Congress enacted Section 304 it intended to deprive the executive agencies of authority to compensate respondents for such services. It necessarily follows that Congress could not have intended to leave with the executive agencies authority to obligate the Government for payment of the salaries while prohibiting their payment.

Section 304 was introduced as an amendment to an appropriation bill—H. R. 2714, 78th Congress, First Session. The purpose of the provision as originally drafted was to "deny the use of federal funds for the payment of salary or compensation for the personal services" of the respective respondents (Report of Committee on Appropriations, House of Representatives Report No. 448, 78th Congress, First Session). Subsequent reports of the legislative conferences to which the measure was submitted reveal no deviation from that purpose other than to include the condition regarding Presidential appointment and Senate confirmation (House Reports Nos. 593, 607, 618 and 661, 78th Congress, First Session).

Respondents Watson and Dodd were appointed pursuant to general authority granted the Federal Communications Commission to appoint necessary personnel, subject to the provision that such employees should be paid only from

such funds as the Congress might from time to time appropriate. *47 USC, Sec. 154*

The Secretary of the Interior appointed respondent Lovett pursuant to similar statutory authority. *48 USC, Sec. 1405 (v)*

Congress traditionally has asserted the power to repeal, suspend and modify authorizations previously conferred by a refusal to appropriate the necessary funds, and the courts have sustained such action. (*United States* v. *Dickerson*, 310 US 554; *United States* v. *Mitchell*, 109 US 146; *Dunwoody* v. *United States*, 143 US 578; *United States* v. *Vultee*, 233 US 509)

In the light of the legislative history, there can be no contention in these cases that the action taken was not deliberate. We are not dealing here with a situation in which the legislature inadvertently failed to provide the money necessary for the exercise of a disbursing authority previously conferred and not specifically revoked.

We are dealing here with a situation in which the Congress, having granted the Federal Communications Commission and the Secretary of Interior the power to engage personnel for compensation within the limits of appropriated money, deliberately has limited the appropriations otherwise available to these agencies for payment to respondents.

It is a cardinal principle of statutory construction that the intention of the legislature must be effectuated. In reaching the decision it made in these cases, the Court of Claims misinterpreted the intention motivating the enactment of Section 304.

As previously indicated, this interpretation of the Court of Claims largely is ascribable to its assumption that in these cases office and compensation were inseparable.

The Constitution vests only the President and the judges of the federal courts with a right to compensation. All other officers and employees of the Government must rely on legislation for any right to compensation they possess.

and none can possess a vested right. The compensation and offices held by them are separable.

In *Embry* v. *United States*, 100 U. S. 680-685, the Supreme Court clearly pointed out that office and compensation are separable. The case involved a postmaster's claim for salary during the period he was suspended, pursuant to the Act of April 5, 1869, 16 Stat. at L. 6. The Court said:

> "We have had no difficulty in reaching the conclusion that the appellant is not entitled to recover. The important constitutional question which has at times occupied the attention of the Political Department of the Government ever since its organization, and which was brought to our attention in the argument, is not, as we think, involved. The question here presented is not one of office, but of salary. Wherever the power of removal from office may rest, all agree that Congress has full control of salaries, except those of the President and the Judges of the Courts of the United States. The amount fixed at any one time may be added to or taken from at will. No officer except the President or a Judge of a Court of the United States can claim a contract right to any particular amount of unearned compensation. If an officer is not satisfied with what the law gives him for his services, he may resign."

The Congress may directly create an office and append to it a designated compensation. Having so done, the legislature may reduce or eliminate compensation affixed to such office without destroying the office itself. (*Dunwoody* v. *United States, supra; United States* v. *Mitchell, supra*)

That reduction or elimination may be effected either by general legislation or by a deliberate refusal to appropriate the funds necessary to pay the compensation previously affixed. (*Dunwoody* v. *United States, supra*)

However, the Congress may invest executive agencies with general authority to employ personnel necessary for the performance of the functions assigned to them, granting to such agencies the power to compensate such personnel within the limits of appropriated funds. One of the funda-

mental questions presented in these cases is whether compensation is inseparably affixed to offices created by executive agencies pursuant to general authority to engage necessary personnel.

The Court of Claims has assumed that compensation does attach to such offices and that the power of a *de jure* incumbent of such an office to acquire a right to compensation for future services may be destroyed only by removal from office, destruction of the office or elimination of the compensation attached to the *office*.

We respectfully urge that where the Congress has delegated to executive agencies the authority to engage necessary personnel to create offices for such personnel, and appoint thereto for compensation, all within the limits of appropriated money, then the Congress may validly revoke the authority to pay or to create an obligation to pay particular persons by a refusal to make available the necessary funds; and that by enacting Section 304 Congress did just this.

Whether Congress constitutionally can exercise such a power is of primary importance. The size and complexity of the Governmental structure necessitates the delegation of broad authority to create positions and appoint necessary employees. However, the Constitution vests in the legislature the exclusive duty of controlling and directing the disbursement of the public funds.

Under the ruling of the Court of Claims the refusal to authorize payment of particular persons appointed pursuant to such general authority is merely a repudiation of a valid obligation and does not curtail the previously conferred authority to obligate the Government. The effect of its decision is to hold that when the Congress confers the general authority to employ necessary personnel, it grants a vested right to compensate such personnel, and waives its power to direct and control the future expenditure of public monies.

The decision is based upon a misinterpretation of the legislative intention and an erroneous assumption that in these cases compensation and office were inseparable.

V.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the petition for writs of certiorari should be granted.

JOHN C. GALL
Special Counsel for
The Congress of the United States
Under House Resolution 386 and Public Law 249
78th Congress

Southern Building,
Washington, D. C.
March, 1946.

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On Writs of Certiorari to the United States Court of Claims.

BRIEF FOR THE CONGRESS OF THE UNITED STATES

JOHN C. GALL
Special Counsel for
The Congress of the United States
Under House Resolution 380 and Public Law 255
78th Congress

DEAN HILL STANLEY,
WILLIAM F. HOWE,
KARL M. DOLLAK,
JOS. G. BUTTS, JR.,
JOHN E. RITZERT,
CLARK M. ROBERTSON,
Of Counsel,

Southern Building,
Washington, D. C.

April 19, 1946.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
I. Opinion Below	1
II. Jurisdiction	2
III. Statement	2
The Parties	2
Statute Involved	3
Essential Facts	4
(a) *History of Section 304*	6
(b) *The Court of Claims Decision*	22
IV. Specification of Errors	23
V. Argument	24
Summary of Argument	24
The Claim that Section 304 is Unconstitutional Does Not Present Justiciable Questions	25
Section 304 Prevented the Executive Agencies From Creating Any Obligation to Pay Respondents for Services Performed After November 15, 1943	29
Section 304 Did Not Terminate Respondents' Services	42
The Implied Power to Remove Certain Officers Was Not Infringed by Section 304	44
(a) *The Claim that Impeachment Was Necessary*	51
(b) *The Condition in Section 304*	54
Section 304 Was Clearly a Valid Exercise of Congressional Authority Over Public Funds	67
(a) *General Nature and Extent of the Power*	72
(b) *If Congress Has Plenary Power to Appropriate, It Follows, Of Course, That Congress May Refuse to Appropriate*	75

Page

(c) *The Power to Appropriate "For the General Welfare" Embraces the Power to Place Limitations and Conditions on Appropriation Bills* 78

(d) *Respondents' Position is Not Supported by Legislative Precedents* 84

(e) *The Congress Has the Power to Appropriate for or to Withhold Appropriations From Individuals by Class or Name* 97

Section 304 Did Not Deprive Respondents of Any Constitutional Right, Either as a Bill of Attainder or by Denial of Due Process of Law 101

(a) *Section 304 is Not a Bill of Attainder* 102

(b) *Section 304 is Not a Denial of Due Process* .. 110

VI. Conclusion 115

CITATIONS.

Cases:

Birdsong v. United States, 34 C. Cls. 437 47
Brown v. Honiss, 74 N. J. L. 501 79
Byers v. United States, 22 C. Cls. 59 ..... 32, 57
Calder v. Bull, 3 Dall. 386 6
California v. San Pablo, etc. Railroad, 149 U. S. 308, 314 ..... 32, 33
Calhoun v. Massie, 253 U. S. 170 81
Capital Trust Co. v. Calhoun, 250 U. S. 208 81
Carmichael v. Southern Coal & Coke Company, 301 U. S. 495 ..... 78, 121
Cincinnati Soap Co. v. United States, 301 U. S. 308 ..... 27, 78, 80
Cochnower v. United States, 248 U. S. 405 31
Coleman v. Miller, 307 U. S. 433 29
Collins v. United States, 14 C. Cls. 568 ..... 56, 70
Collins v. United States, 15 C. Cls. 22 27
Cotten v. Ellis, 52 N. C. 545 59
Cummings v. Missouri, 4 Wall. 277 104
Currin v. Wallace, 306 U. S. 1 112
Dent v. West Virginia, 129 U. S. 114 105

Page

Detroit Bank v. United States, 317 U. S. 329 112
Dickerson v. United States, 310 U. S. 554 39
Dodge v. Bd. of Education, 302 U. S. 74 34
Dunwoody v. United States, 143 U. S. 578, 23 C. Cls. 82 39
Electric Bond & Share Co. v. Securities and Exchange Commission, 303 U. S. 419 119
Embry v. United States, 100 U. S. 680 ..... 32, 51, 67, 112
Ewing v. United States, 35 C. Cls. 374 47
Ex parte Garland, 4 Wall. 333 104
Foote v. United States, 23 C. Cls. 443 57
Friedman v. Schwellenbach et al., Civil Action No. 27196, D. C. (D. C.) decided April 1, 1946 108
Glavey v. United States, 182 U. S. 595 31
Hamilton v. Kentucky Distilleries & Warehouse Company, 251 U. S. 146 69
Hart v. United States, 118 U. S. 62, 16 C. Cls. 459, ... 27, 70, 77
Hawker v. New York, 170 U. S. 189 105
Helvering v. Davis, 301 U. S. 619 78
Helvering v. Lerner, 314 U. S. 463 119
Hirabayashi v. United States, 320 U. S. 81 ..... 112, 114
Hooe v. United States, 218 U. S. 322 ..... 80, 83
Humphrey's Executor, Rathbun v. United States, 295 U. S. 602 ..... 48, 49
Keokee Consolidated Coke Co. v. Taylor, 234 U. S. 224 113
Kilbourn v. Thompson, 103 U. S. 168 110
Kirschbaum v. Walling, 316 U. S. 521 119
Knote v. United States, 95 U. S. 149 ..... 27, 77
Korematsu v. United States, 323 U. S. ..., 89 L. ed. Adv. Op. 202 124
Lee v. United States, 45 C. Cls. 55 67
License Tax Cases, 5 Wall. 462 87
Matthews v. United States, 123 U. S. 182 ..... 32, 34
McGrain v. Daugherty, 273 U. S. 135 110
McLean v. United States, 93 U. S. 750 57
Myers v. United States, 272 U. S. 52 ..... 15, 18, 19, 79, 125
Mississippi ex rel. Robertson v. Miller, 276 U. S. 174 34
Mississippi v. Johnson, 4 Wall. 475 ..... 70, 125

Page

National Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U. S. 1 119
Nebbia v. New York, 291 U. S. 502 ..... 115, 12[illegible]
Neustein v. Mitchell, 52 Fed. Supp. 531 ..... 8[illegible]
Norton v. Shelby Co., 118 U. S. 425 26
Norwegian Nitrogen Products Company v. United States, 288 U. S. 294 111
Osborn v. United States, 91 U. S. 474 27
Perkins v. Lukens Steel Company, 310 U. S. 113 119
Pullman Co. v. Knott, 235 U. S. 22 114
Reeside v. Walker, 11 How. 272 ..... 27, 12[illegible]
Reetz v. Michigan, 188 U. S. 505 ..... 10[illegible]
Reid v. Smoulter, 128 Pa. State 324 ..... 5[illegible]
Ristine v. State, 20 Ind. 328 ..... 7[illegible]
Sinclair v. United States, 279 U. S. 263 ..... 11[illegible]
Spaulding v. Douglas Aircraft, 60 Fed. Supp. 985 ..... [illegible]
State v. Derham, 61 S. C. 258 ..... [illegible]
State v. Kenney, 9 Mont. 389 ..... [illegible]
State v. Moore, 50 Neb. 88 ..... [illegible]
State ex rel Tolerton v. Gordon, 236 Mo. 142 ..... 52, 59, 12[illegible]
Stewart v. United States, Civil Service Commission, 45 F. Supp. 697 ..... 8[illegible]
Stewart Machine Co. v. Davis, 301 U. S. 548 ..... 11[illegible]
Stratton v. Green, 45 Calif. 149 ..... 7[illegible]
Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381 ..... 11[illegible]
Texas & New Orleans R. Co. v. Brotherhood of Railway & S. S. Clerks, 281 U. S. 548 ..... 11[illegible]
The Menominee Tribe v. United States, 101 C. Cls. 10 ..... 11[illegible]
United States v. Andrews, 240 U. S. 90 ..... [illegible]
United States v. Barringer, 188 U. S. 577 ..... [illegible]
United States v. Butler, 297 U. S. 1 ..... 69, 7[illegible]
United States v. Darby, 512 U. S. 100 ..... 116, 12[illegible]
United States v. Fisher, 109 U. S. 143 ..... [illegible]
United States v. Langston, 118 U. S. 389 ..... [illegible]
United States v. McDonald, 128 U. S. 471 ..... 32, 34
United States v. Mitchell, 109 U. S. 146 ..... 34, 5[illegible]
United States v. Smith, 286 U. S. 6 ..... [illegible]
United States v. Trans-Missouri Freight Association, 166 U. S. 290 ..... [illegible]
United States v. Vulte, 233 U. S. 509 ..... [illegible]
Williams v. Mayor & City Council of Baltimore, 289 U. S. 36 ..... 114, 11[illegible]

Page

Wilson v. New, 243 U. S. 332 116
Wood v. United States, 107 U. S. 414 33

Opinions of the Attorney General:

4 Op. Atty. Gen. 248 64
7 Op. Atty. Gen. 215 57
16 Op. Atty. Gen. 522 ..... 60, 66
17 Op. Atty. Gen. 521 66
30 Op. Atty. Gen. 51 ..... 59, 62
32 Op. Atty. Gen. 271 66
34 Op. Atty. Gen. 490 63

Decisions of the Comptroller General:

23 Comp. Gen. 906 64

Constitution

Article I, Section 2 51
Section 8 ..... 55, 67, 68
Section 9 ..... 27, 40, 45, 68, 101, 102

Article II, Section 1 ..... 31, 60
Section 2 ..... 33, 44, 76, 77
Section 4 ..... 51, 53

Article III, Section 1 ..... 31, 60
Amendment V 81

Statutes

Act of May 1, 1810 (2 Stat. 608) 100
Act of July 12, 1870 (16 Stat. 251) 61
Act of May 1, 1884 (23 Stat. 17) 61
Act of June 22, 1936 (49 Stat. 1807) 48 U. S. C. 1405, et seq. 3, 28, 36
Appropriation Act of October 22, 1913 (38 Stat. 211) 5 U. S. C. 54 52
Civil Service Act of 1883, sec. 8 (22 Stat. 406) 52
Classification Act of 1923 (5 U. S. C. 661 674) 35, 36, 52
Deficiency Appropriation Act of 1924 (43 Stat. 1214) 60
Department of Justice Appropriation Act for 1943 (56 Stat. 468, 482) 6
Emergency Relief Appropriation Act of 1941 (Secs. 15f, 17B, 54 Stat. 611) 6
Federal Communications Act of 1934, Sec. 4 (48 Stat. 1066, as amended) 47 U. S. C. 154 ..... 4, 28, 36, 41
Hatch Act, 18 U. S. C. 61, et seq. 6, 52

Page

Public Law 132 (57 Stat. 431, 450) ..... 2, Passim
Public Law 249, 78th Cong., 2d Sess. 3
Revenue Act of 1924 (43 Stat. 253-355) 99
Revenue Act of 1926 (44 Stat. 9-131) 99
Revised Statutes 1761; 5 U. S. C. sec. 55 98
Revised Statutes 3733 61
1 Stat. L. 105 98
2 Stat. L. 608 100
12 Stat. 646; 5 U. S. C. 56 65
19 Stat. 370 61
27 Stat. 591; 5 U. S. C. 53 99
34 Stat. 48; 31 U. S. C. 665 ..... 61, 64
34 Stat. 255 61
54 Stat. 751; 5 U. S. C. 56 65
55 Stat. 92, 265, 292, 303, 366, 408, 446 7
55 Stat. L. 396 97
Urgent Deficiency Appropriation Act, 1943
Sec. 304 (57 Stat. 431) ..... 2, Passim

LEGISLATIVE DOCUMENTS

Cong. Rec., 61st Cong., 3d Sess., Vol. 46
P. 1613 92
Cong. Rec., 65th Cong., 2d Sess., Vol. 56
P. 6868 93
Cong. Rec., 65th Cong., 3d Sess., Vol. 57
P. 4163 93
P. 3315 94
Cong. Rec., 67th Cong., 1st Sess., Vol. 61
P. 684 94
P. 5210 95
Cong. Rec., 67th Cong., 2d Sess., Vol. 62
P. 4295 94
P. 5210 95
Cong. Rec., 68th Cong., 1st Sess., Vol. 65
P. 5041 95
Cong. Rec., 72d Cong., 1st Sess., Vol. 75
P. 4560 95
Cong. Rec., 77th Cong., 1st Sess., Vol. 87
P. 5110 95
P. 5111 95
P. 5112 95
P. 5113 95
P. 5151 96
P. 5384 96

Page
P. 5385 96
P. 9494 96
P. A2982 96
Cong. Rec., 78th Cong., 1st Sess., Vol. 89, 1943 Daily Edition (bound vol. page numbers indicated in parenthesis)
P. 624 (645) 11
P. 777 (738) 12
P. 779 (740) 13
P. 4652 (4582) 16
P. 4670 (4600) 21
P. 5915 (5826) 19
P. 6012 (5920-22) 20
P. 6013 (5922) 14, 20
P. 6817 (6692) 17
P. 6854 (6730) 18
P. 7078 (7002) 18
Cong. Rec., 78th Cong., 2d Sess., Vol. 90, 1944 Daily Edition
P. 2075 (2055) 3
H. Rept. 448, 78th Cong., 1st Sess. 13
H. Rept. 1117, 78th Cong., 2d Sess. 2
H. Doc. 299, 77th Cong., 1st Sess. (History of The Committee on Appropriations) 73
H. Doc. 833, 77th Cong., 2d Sess. 9, 10
H. Doc. 51, 78th Cong., 1st Sess. 10
H. Doc. 162, 78th Cong., 1st Sess. 10
H. Rept. 661, 78th Cong., 1st Sess. 18
H. Res. 105, 78th Cong., 1st Sess. 11, 110
H. Res. 386, 78th Cong., 1st Sess. 3
Hearings, H. Subcommittee on Interior Department Appropriations 16
Hearings, Special Subcommittee of the Committee on Appropriations, 78th Cong., 1st Sess. 13, 15
Hearings on H. Res. 282 (Special Committee on Un-American Activities)
Vol. 7, p. 3296 ..... 14, 15
Vol. 17, p. 10280 9
Rules & Manual, House of Representatives (1943 ed.) 13, 74, 84, 86, 87, 96
Senate Rept. No. 724, 78th Cong., 2d Sess. 3
S. 575, 78th Cong., 1st Sess. 19

TREATISES

Page

Beck, James M., *Neither Purse Nor Sword* 71
Beck, James M., *Our Wonderland of Bureaucracy* 70
Cooley, *A Treatise on the Constitutional Limitations* (8th Ed., 1927) 15
Dwight, Theodore W., *Trial by Impeachment* (1867) 5

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Vol. 13 73

The Federalist
No. 47 12
No. 48 12
No. 51 12
No. 58 76

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Vol. VII 3
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Vol. I 76, 7
Vol. III 11
Wilmerding, *The Spending Power* (1943) 7
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MISCELLANEOUS

In the Matter of the Removal of Helen Miller, Decision and Order of Removal, Secretary of Labor (August 1, 1941) 1
United States Civil Service Commission, *Monthly Report of Employment*, Jan., 1945 3
In re Harry Bridges, before the Attorney General in Deportation Proceedings (G.P.O. 1942) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 809.

UNITED STATES, *Petitioner*,

v.

ROBERT MORSS LOVETT.

No. 810.

UNITED STATES, *Petitioner*,

v.

GOODWIN B. WATSON.

No. 811.

UNITED STATES, *Petitioner*,

v.

WILLIAM E. DODD, JR.

On Writs of Certiorari to the United States Court of Claims.

BRIEF FOR THE CONGRESS OF THE UNITED STATES.

I.

OPINION BELOW.

The opinion of the Court of Claims entered in the above-captioned cases on November 5, 1945, has not been officially reported.

II.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended.

III.

STATEMENT.

The Parties.

On December 6, 1943, the Attorney General informed the Congress that respondents herein had filed petitions in the Court of Claims seeking recovery from the United States of compensation for services rendered after the effective date of Section 304 of the Urgent Deficiency Appropriations Act of 1943, *infra*, and that at the time the President approved the act it was his view that the provision was unconstitutional. The Attorney General stated:

> "... my position concurs with the President's ... It is at odds with the position of the Congress. In these circumstances I feel that the Congress should be afforded an opportunity to be represented by their own counsel ... to file a brief and argue on behalf of the position of the Congress ... I find it impossible to advocate with conviction the views of the Congress."[1]

The Court of Claims noted the appearance of the Attorney General as follows:

> "The Attorney General, having heretofore ... taken the position that the section was unconstitutional and still adhering to that position, the Assistant Attorney General, appearing for the defendants, supports the plaintiffs." (R. 34)

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[1] House Report 1117, 78th Congress, 2d Sess., page 3. This report also includes the Attorney General's communication of January 31, 1944, in which he stated that Counsel for the Congress "should have entire freedom in filing briefs and making oral arguments in support of the position of the Congress." (Page 4)

In the Court of Claims, as here, the Congress was represented by special counsel appointed pursuant to House Resolution 386 and Public Law 249, 78th Congress, which were adopted in order that such counsel "be permitted to defend the action of the Congress in enacting Section 304 of Public Law 132"[2] and "to represent the views of the Congress in the matter."[3]

Statute Involved.

These cases involve Section 304 of the Urgent Deficiency Appropriation Act of 1943, approved by the President July 12, 1943,[4] which provides as follows:

> "Sec. 304. No part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act, or (2) which is now, or which is hereafter made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States, shall be used, after November 15, 1943, to pay any part of the salary, or other compensation for the personal services, of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has been appointed by the President, by and with the advice and consent of the Senate: *Provided*, that this section shall not operate to deprive any such person of payment for leaves of absence or salary, or of any refund or reimbursement, which have accrued prior to November 15, 1943: *Provided further*, that this section shall not operate to deprive any such person of payment for services performed as a member of a jury or as a member of the armed forces of the United States nor any benefit, pension, or emolument resulting therefrom." (R. 22)

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[2] Senate Report No. 724, 78th Cong., 2d Sess.

[3] See statement of Senator Hatch in explanation of Public Law 249, *supra*, Congressional Record, Vol. 90, February 25, 1944, page 2075.

[4] 57 Stat. 431, 450.

Essential Facts.

At the time Section 304 became effective, Respondents Watson and Dodd were employees of the Federal Communications Commission, having been appointed pursuant to Section 4 of the Federal Communications Act of 1934, which provides, *inter alia*, that:

> "The Commission shall have authority, subject to the provisions of the civil-service laws and sections 661 to 674 of Title 5, to appoint such other officers, engineers, accountants, inspectors, attorneys, examiners, and other employees as are necessary in the execution of its functions . . .
> "(g) The Commission may make such expenditures (including expenditures for rent and personal services at the seat of government and elsewhere; for office supplies, law books, periodicals, and books of reference; and for printing and binding) as may be necessary for the execution of the functions vested in the Commission and as from time to time may be appropriated for by Congress . . ." *47 U. S. C. 154(f),(g)*

Respondent Watson continued to perform the duties of his position until November 21, 1943. He resigned May 21, 1944, not because of Section 304, but, as he explained in a letter of resignation to his executive superior, for the reason that:

> "The reduction in appropriation for the Foreign Broadcast Intelligence Service makes necessary the elimination of the Analysis Division . . . That seems to me to mark the termination of the work which I came to Washington to do and is hence an occasion on which I submit my resignation." (Fdgs., R. 24)

Respondent Watson's executive superior acknowledged this letter of resignation in part as follows:

> "It is true that the position which you held and which was kept vacant for you has been eliminated, so that there is no practical reason for continuance of you on the rolls of the F. C. C. Your resignation coming in

this way makes it very clear cut that the act is voluntary." (Fdgs., R. 25)

Dodd remained as an employee through November 21, 1943. (Dodd, Fdgs., 3, R. 30) His position, like Watson's, was abolished by his executive superiors in line with a reduction in appropriations for the Foreign Broadcast Intelligence Service.

On November 15, 1943, Respondent Lovett occupied the position of Executive Assistant to the Governor of the Virgin Islands, having been appointed under Section 23 of the Act of June 22, 1936, which provides:

> "'The Secretary of the Interior shall appoint such other executive and administrative officers as may in his discretion, be required . . . The salary of all executive officers and employees appointed . . . by the Secretary of the Interior shall be paid from funds appropriated for the Government of the Virgin Islands by the Congress in annual appropriation bills, or as may be otherwise provided by law . . .'" *48 U. S. C. 1405(c)*

Respondent Lovett continued as a federal employee until he resigned at the request of Secretary Ickes, because, according to the request:

> "this Department has been bitterly criticized by the Congress in recent months for continuing to accept"

respondent Lovett's services. (Fdgs., R. 19) Accordingly, respondent Lovett resigned March 13, 1944, approximately four months after the effective date of Section 304. (Lovett, Fdgs., 3, R. 19, 20)

On December 3, 1944, each of the respondents filed a petition in the Court of Claims to recover compensation equivalent to salary for services rendered after November 15, 1943, alleging a demand for payment thereof and a refusal because of Section 304

> "and the fact that the President did not appoint him thereunder"

The court below considered the three cases together and gave judgments for the then plaintiffs, which judgments the Court said:

> "may be satisfied by any appropriation out of which the judgments may be by Act of Congress payable" (R. 40)

(a) *History of Section 304.*

In recent years Congress has found it necessary to deal with the problem of subversive activity on the part of federal employees. This does not mean that federal employees, generally, have engaged in such activities; however, the problem was serious enough that in 1939 the Hatch Act was passed. (Act of August 2, 1939, 53 Stat. 1148) Section 9A provided:

> "(1) It shall be unlawful for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any Act of Congress, to have membership in any political party or organization which advocates the overthrow of our Constitutional form of government in the United States.
>
> "(2) Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any Act of Congress for such position or office shall be used to pay the compensation of such persons."

In June, 1940, a limitation was incorporated in the Emergency Relief Appropriation Act of 1941 (Sections 15(f), 17(b), 54 Stat. 611), as follows:

> "No alien, no Communist, and no member of any Nazi Bund Organization shall be given employment or continued in employment on any work project prosecuted under the appropriations contained in this joint

resolution and no part of the money appropriated in this joint resolution shall be available to pay any person who has not made or who does not make affidavit as to United States citizenship and to the effect that he is not a Communist and not a member of any Nazi Bund Organization, such affidavit to be considered prima facie evidence of such citizenship, and that he is not a Communist, and not a member of any Nazi Bund Organization." (Sec. 15(f))

"No portion of the appropriation made under this joint resolution shall be used to pay any compensation to any person who advocates, or who is a member of an organization that advocates, the overthrow of the Government of the United States." (Sec. 17(b))

Early in 1941 Congress began the practice of including in its regular appropriation acts a similar provision, together with criminal penalties for its violation.[5]

There was much complaint that the prohibitions of the Hatch Act were not effective. Initially, under that act, complaints as to subversive activities of federal employees were referred to the employing agencies; and an FBI investigation was made only upon the request of that agency. In June, 1941, Congress took further cognizance of the problem by providing in the Department of Justice Appropriation Act a fund with the following instruction as to its use:

". . . at least $100,000 shall be available exclusively to investigate the employees of every department, agency and independent establishment of the Federal Government who are members of subversive organizations or advocate the overthrow of the Federal Government, and report its findings to Congress." (55 Stat. 292)

The reports submitted to Congress were in summary form only, and did not inform the Congress of the organizations

[5] See 55 Stat. 92, Sec. 5; 55 Stat. 265, Sec. 504; 55 Stat. 303, Sec. 7; 55 Stat. 366, Sec. 10; 55 Stat. 408, Sec. 3; 55 Stat. 446, Sec. 5, 704.

considered by the Attorney General to be within the scope of the inquiry.

Before the first report of the Attorney General was received, the Congress had made an additional appropriation of $200,000 for a continuation of the FBI investigations. (Department of Justice Appropriation Act for 1943, 56 Stat. 468, 482)

Another phase of the matter deserves mention. In August, 1939, the Russian-German alliance was announced. Following the announcement of this pact, Communists and the Communist Party were bitterly criticized in this country. Until Germany invaded Russia in 1941, those who followed the Communist Party line were opposed to the entry of the United States into the war against Germany. Impetus therefore was given to the organization and promotion of so-called "Communist-front" organizations, which enlisted the sponsorship and support of many eminently respectable people but which, at the same time, furnished a refuge for those who followed the Communist Party line and who, for many reasons, including, no doubt, the prohibitions of the Hatch Act, did not desire to identify themselves as members of the Communist Party.*

Growth of these so-called "front organizations" was recognized by various agencies of government. The Special House Committee on Un-American Activities called attention to them. In his opinion in the Harry Bridges deportation case (May 28, 1942) the Attorney General said:

> "Testimony on 'front organizations' showed that they were represented to the public for some legitimate reform objective, but actually used by the Communist Party to carry on its activities pending the time when the Communists believe they can seize power through revolution. The Party took control of the Workers' Alliance as a medium through which to organize the unemployed, 'to develop widespread militant mass

* In this connection, see Decision and Order of Removal, Secretary of Labor, in the Matter of the Removal of Helen Miller, Aug 1, 1941.

struggles,' and 'to build the revolution through association in 'a militant class-conscions unemployed organization.'

"Other Communist front organizations were the International Labor Defense, whose immediate purpose was to defend Communists, but among whose members were many non-Communists unaware of its Communist control; the All-American Anti-Imperialist League, the American Negro Labor Congress, and the American League Against War and Fascism."

Again, the Attorney General in his first report after the FBI's special investigations were ordered, said:

"Moreover, it is now clear that the objective test of membership in a 'front' organization is thoroughly unsatisfactory. Appraisal of an individual's political opinions and points of view is difficult enough at best. The objective test fails completely where 'subversive' character is so imperfectly indicated and where the purposes of the organization are so stated as to make membership in most circumstances consistent with loyalty." (House Doc. 833, 77th Cong., 2d Sess., P. 4)

Under the first appropriation of $100,000 the FBI, up to August 22, 1942, had dealt with complaints against 4,579 federal employees. Of these, about 1,100 names were supplied by the House Committee on Un-American Activities. By the same date the FBI had completed and forwarded to the executive agencies concerned 2,095 reports, and in 1725 cases had been informed by the employing agencies of the disposition of the cases. Net result: Thirty-six persons

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The Attorney General also referred to the National Students League and the Youth Congress as "both identified as front organizations of the Communist Party." Opinion in Bridges Case, p. 25. The name of the American League Against War and Fascism was changed to American League for Peace and Democracy in 1937. In 1940 it became the American Peace Mobilization. After Germany invaded Russia, it became the American People's Mobilization. (See hearings on H. Res. 282, Vol. 17, Sept. 27, 28, 29; October 3, 4, 5, 1944, p. 10280).

were reported separated from the federal service, only two of whom were on the Congressional list. Thirteen other persons had been "reprimanded or transferred from national defense employment." (House Doc. No. 833, 77th Cong., 2d Sess., pp. 17, 18)

Results of further investigations followed the same pattern. (House Doc. 51 and 162, 78th Cong., 1st Sess.) By March 31, 1943, the number of employees complained of had risen to 4,948; the number of completed investigations had risen to 2,303; and the executive agencies had "closed" 2,118 cases. They reported a total of forty-three separations from the federal service and thirty-nine cases of other administrative action. From the 1,100 names on the Congressional list, investigations of which had been completed, four persons were separated and two others were the object of some other administrative action.

This, then, was the situation in the Spring of 1943, when Congress came to consider its regular annual appropriation bills for the ensuing fiscal year. The Hatch Act, obviously, was inadequate to deal with cases of subversive activity and affiliations generally due to its limited coverage and the admitted difficulties of application.* Nevertheless, Congress had received widespread complaints of such activities and affiliations on the part of some federal employees. The executive department, through the Attorney General, had expressed strong opposition to a continuance of the FBI investigations for which Congressional appropriations had been made. If the subject were to be dealt with effectively, it appeared to the Congress that some additional legislation would be necessary. Attempts had already been initiated by an amendment to the Treasury and Post Office Appropriation Bill to provide that

> "no part of any appropriation contained in this Act shall be used to pay the compensation of"

* See the Secretary of Labor's Decision, Matter of Helen Miller.

thirty-nine individuals named in the House on February 1, 1943, by the Chairman of the House Committee on Un-American Activities. (Cong. Rec., Vol. 89, P. 624)

The legislative precedents clearly supported the power of the house to condition the expenditure of public funds and to provide that no part of any funds appropriated in the particular bill or in any future bill should be used otherwise than as directed by Congress.[9]

However, when it was proposed in the House to restrict payment of salaries to the thirty-nine named individuals above referred to by amendment of the pending appropriation bill, objections, based on policy grounds, were made; and it was determined to create a special committee (the Kerr Subcommittee)[10] to inquire into the facts and to recommend appropriate legislation.

On a number of other occasions, amendments withholding funds for individual salaries had been adopted by the House without prior consideration in the Committee on Appropriations. H. Res. 105[11] authorized a subcommittee of the Committee on Appropriations to carefully consider amendments of this type prior to action on the floor of the

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[9] See section entitled "Respondents' position is not supported by legislative precedents."

[10] The Chairman of this subcommittee, Judge John H. Kerr, of North Carolina, has been a Member of Congress for twenty-three years. The other members were Representatives Anderson, of New Mexico (now Secretary of Agriculture); Gore, of Tennessee; Keefe, of Wisconsin; and Powers, of New Jersey.

[11] H. Res. 105 authorized and directed the subcommittee (hereinafter referred to as the "Kerr Subcommittee") to "examine into any and all allegations or charges that certain persons in the employ of the several executive departments and other executive agencies are unfit to continue in such employment by reason of their present association or membership or past association or membership in or with organizations whose aims or purposes are or have been subversive to the Government of the United States. Such examination shall be pursued with the view of obtaining all available evidence bearing upon each particular case and reporting to the House the conclusions of the committee with respect to each such case in the light of the factual evidence obtained . . ."

House. The Special Appropriations Subcommittee was created to give respondents and others a hearing, not as a matter of right, but, as stated by Representative Vorys, "a chance to have their say." (Cong. Rec., Feb. 9, 1943, Vol. 89, P. 777)

During the debate on H. Res. 105, Representative Vorys explained the problem as follows:

> "Congress has the power to refuse to appropriate for an individual just as it has the power to appropriate for an individual. We exercise both these powers constantly when we pass or refuse to pass private bills.
>
> "It is good legislative practice, however, and good business, and good sportsmanship, to give a man a chance for a hearing before taking action on his affairs. *This is not a trial, for there is no criminal charge involved, and no one has a property right in a public job;* but it is sound human nature to hear a man's story when dealing with his affairs and it will make us proceed more carefully. I think, however, we will have to proceed. We should not appropriate for Communists and fellow travelers in Government service, as soon as they are fully identified. On the other hand, we should give them *not a day in court, for this is not a court matter, but a chance to have their say* before we act." (Italics supplied) (Cong. Rec., Vol. 89, P. 777)

The author of H. Res. 105, Representative Cannon,[12] Chairman of the Committee on Appropriations, made the following explanation of the resolution:

> " . . . the only change provided by this resolution from the established order is that under the present

[12] An eminent authority on parliamentary law, Chairman Cannon is editor and compiler of "Precedents of the House of Representatives," by Act of Congress; editor of two editions of the Manual and Digest of the House of Representatives, 1916 and 1918; author of A Synopsis of the Procedure of the House, 1919, of Procedure in the House of Representatives, 1920 and 1943, of Cannon's Procedure, 1928 and 1939, and of treaties on parliamentary law in Encyclopaedia Britannica, 1929 and 1938, and in the Encyclopaedia Americana, 1940.

system we have to wait until we reach the bill which carries that particular salary before taking action:

"The one thing this resolution does, and it is infinitesimal in importance in comparison with the time we have spent on the subject, is that it permits us to take action at once instead of waiting for the appropriate bill to come along. In other words, this resolution permits us to take action on all such cases at one and the same time instead of taking them up one by one in bill after bill as the annual supply bills are reported to the House during the session." (Cong. Rec., Feb. 9, 1943, Vol. 89, P. 779)

The Kerr Subcommittee held executive sessions in accordance with the rules of the House of Representatives. The committee placed no injunction of secrecy upon the record of its hearings. On the contrary, respondents' testimony in their own behalf was officially reported and printed for public distribution,[13] discussed in open debate in both houses of Congress, and references to all of the evidence necessary to support the committee findings were spread upon the public record in the following documents:

(1) The Subcommittee Report of April 21, 1943 (House Rept. 448, 78th Cong. 1st Sess., p. 3)

(2) The Subcommittee Report of May 14, 1943 (Id., p. 1)

(3) "Exhibits Relating to Goodwin B. Watson" (Hearings, Special Subcommittee on Appropriations, 78th Cong., 1st Sess., p. 258)

(4) "Exhibits Relating to Robert Morss Lovett" (Id., p. 201)

It is well settled by Congressional practice that:

"It is for the committee to determine, in its discretion, whether the proceedings of the committee shall be open or not" (See Rules and Manual, U. S. House of Representatives, 1943, p. 129)

[13] Hearings, Special Subcommittee of the Committee on Appropriations, 78th Congress, 1st Sess.

As a matter of fact, it was generally understood by the sub committee that respondents *desired* to be heard in executive session. This was clearly indicated by respondent Watson when he testified earlier before the Special Committee on Un-American Activities. Respondent Watson told the committee that one of his objections to their past hearings was that the employees

> "were tried in the newspapers rather than as we have worked this afternoon, *in executive session*" (Italics supplied) (Hearings Before a Special Committee on Un-American Activities, Vol. 7, Exec. Hearings, p. 3294)

No witnesses accompanied respondents to the hearings; and no request for witnesses was made by respondents. (R. 21) On the contrary, respondents clearly indicated by their conduct and statements that they did not desire to produce witnesses nor to furnish any further evidence in this matter. (R. 20, 21; 27; 30, 31)

In this connection, Chairman Kerr advised the House:

> "No person appearing before this committee has asked for counsel and no person has been subpenaed to appear before this committee. The question of the right of counsel has never been raised. These parties have appeared in response to a letter inviting them to appear if they desired to do so and make such explanations or statements as they cared to make in connection with the allegations and charges." (Cong. Rec., June 15, 1943, Vol. 89, p. 6013)

Acting under the mandate contained in H. Res. 105, the Kerr Subcommittee proceeded to

> " . . . procure the evidence in each individual case from each department or agency of the Government . . ."

and also

> " . . . from the Special Committee to Investigate Un-American Activities, the Federal Bureau of Investiga-

> tion, the United States Civil Service Commission, the Interdepartmental Committee, and the Federal Communications Commission" (Hearings, Subcommittee of the Committee on Appropriations, 78th Congress, 1st Sess., p. 329)

Respondents were *invited* to appear before the Kerr Subcommittee and were

> "... given at the hearing full opportunity to make any statements or explanations desired with respect to the subject matter of the investigation" (R. 21, 27, 31)

Respondents were thoroughly familiar with the charges which originated in and were made by the Committee on Un-American Activities; no charges were formulated by the Kerr Subcommittee.

More than twelve months before respondents appeared at the Kerr Subcommittee hearing, the Committee on Un-American Activities charged that respondents Dodd and Watson had been associated with many of the "Communist front" organizations later mentioned in the Kerr Subcommittee report. As early as February 6, 1942, these charges were discussed on the floor of the House and published in the Congressional Record.

The so-called "charges" against respondents were contained in a speech delivered by Representative Dies on the floor of the House on February 1, 1943, published in the Congressional Record, and widely publicized more than two months before the first hearing before the Kerr Subcommittee. Not only were respondents' activities widely publicized, *but prior to the Kerr Subcommittee hearings* they were all examined with reference thereto by the House Committee on Un-American Activities,[14] the Federal Bureau of Investigation, and, presumably, by their superiors in the departments in which they were employed. Respondent,

[14] See hearings before the House Committee on Un-American Activities, Vol. 7, 78th Cong., 1st Sess.

Lovett was also examined at length by the House Subcommittee on Interior Department Appropriations.[15]

An examination of the hearings before the Committee on Un-American Activities held prior to the Kerr Subcommittee hearings will disclose that respondents were examined on substantially every activity covered during the Kerr Subcommittee inquiry. Respondents, therefore, were thoroughly familiar with the charges.

Chairman Kerr stated the subcommittee's position as follows:

> "You must understand that *your subcommittee was not employed to remove anybody from office.* We were not delegated to *remove* anybody from office. This House simply requested this committee to examine the facts and the charges made against various people here who had been charged with activity which was subversive of our form of government and which had for its purpose its overthrow and destruction."

Chairman Kerr continued:

> "This Congress has the right to say to whom the people's money shall be paid . . . The question involved here is one that simply involves that proposition . . ." (Cong. Rec., Vol. 89, May 18, 1943, p. 4652)

Upon its failure to appoint respondents thereunder, the executive department terminated their salaries in full compliance with Section 304 of the act. Respondents now find themselves in a wholly untenable position. They assert that the failure of the President to submit them to Senate scrutiny was due to a belief that Section 304 was unconstitutional; yet they necessarily admit that by terminating their salaries pursuant thereto, the executive department acted upon the presumption that said section was constitutional and effective as to prohibiting the withdrawal of funds from the Treasury for payment to respondents.

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[15] See hearings before the Subcommittee on Interior Department Appropriations, April 14, 1943.

A fair analysis of the legislative history of Section 304 reveals a complete refutation of the contention that the House forced the Senate to adopt Section 304. The Senate's refusal to concur immediately in the original version of the proviso was due, at least in part, to the fact that the Senate had been misinformed by the executive department as to the nature of the proceedings in the Kerr Subcommittee and in the House, as well as in regard to the true character of the respondents.

Moreover, the Senate never voted to reject Section 304 in its final form as a separate proposition. It cannot be maintained that the Senate rejected the conference report on the Urgent Deficiency Appropriation Bill merely because it disapproved Section 304 thereof. Senator Revercomb told the Senate that the conference report was not rejected simply because it contained Section 304, but for

> "* * * a much more important reason, in my opinion—there had been defeated in conference a provision restricting the use of an emergency fund given into the hands of the President. . . . The Senate wrote into the bill, with respect to the use of that fund, a provision that no part of the fund should be used by the Chief Executive for any agency or for any purpose for which the Congress had refused to make an appropriation * * *."
>
> "For that reason, I urge upon this body that the report be rejected, and that we adhere to our position that the limitation be placed upon the funds, as we previously decided should be done . . ." (Cong. Rec., June 29, 1943, Vol. 89, P. 6817)

The Senate never did agree to the conference report until it had been revised to include an amendment providing that no part of certain funds could be used

> ". . . to finance a function or project for which function or project a budget estimate of appropriation was transmitted . . . during the Seventy-eighth Congress and such appropriation denied after considera-

> tion thereof by the Senate and House . . . or by the Committees on Appropriations of both bodies." (See House Rept. 661, 78th Cong., 1st Sess.)

Senator McKellar was of the opinion that the conference report

> ". . . was defeated because that part of it was not in."

and he stated, further, that had the conference report contained the restriction upon the use of the emergency fund when the previous votes were taken, it " . . . would probably have been agreed to." (Cong. Rec., June 29, 1943, Vol. 89, p. 6854)

The clause in Section 304 which conditions the use of appropriations upon respondents' appointment by the President with Senate concurrence did not originate in the House—it was conceived in and proposed by the Senate. How can it be said that Section 304, which, in its final form, was drafted by the Senate, was forced upon that body by the House? On the contrary, the Senate first passed Section 304 in its final form and recommended that the House concur therein. (See conference report as reported by Senate Conferees, approved by the Senate, Cong. Rec., July 2, 1943, Vol. 89, P. 7078)

The use of funds with which to pay respondents' salaries is conditioned upon their appointment by the President and confirmation by the Senate. Certainly, the Senate could not be said to have opposed this proposition, since, at the time Section 304 was pending and only about two weeks prior to its passage, the Senate, by a decisive vote, enacted a bill which provided, *inter alia*, that every incumbent of

> "an office or position in or under the executive branch of the Government of the United States . . . who receives compensation amounting to $4,500 or more per year for his services"

shall be appointed by the President and confirmed by the Senate prior to June 30, 1943.[16]

The principle of requiring certain classes of employees, *including incumbents*, to be appointed by the President with Senate concurrence had been approved by the Senate in other instances—Congress passed, and the President approved without protest, the Act of October 26, 1942, which provided as to certain items:

> "That no part of this appropriation shall be available to pay the salary of any *person* at the rate of $4,500 per annum or more unless such person shall have been appointed by the President, by and with the advice and consent of the Senate." (Italics supplied) (P. L. 763, 77th Cong., 2d Sess., Second Supplemental National Defense Appropriation Act, 1943)

The record does not support respondents' statement that the proceedings of the Kerr Subcommittee were "secret." (R. 6, 11, 16)

On June 15, 1943, the Chairman of the Appropriations Subcommittee made the following statement to the House:

> "There seemed to be much confusion in the Senate as to what had transpired in the House and before the Appropriations Committee of the House, and particularly as to the hearings before the subcommittee of the Appropriations Committee.
>
> "Senator McKellar requested from the Kerr committee the transcripts of evidence in the above hearings a few days before this matter was taken up in the Senate and the evidence was promptly furnished to him. It was not contemplated that this evidence would be printed at least until all hearings were completed. A number of the Senators seemed not to have a clear

[16] The Bill (S. 757) was passed by the Senate June 14, 1943 (Cong. Rec., Vol. 89, p. 5915, Daily Edition) and provided, further, that any incumbent not so appointed might "continue to hold such office or position until his successor is appointed," [if a successor be nominated prior to June 30, 1943] but in any event not later than September 30, 1943.

understanding of what had transpired or what the procedure had been in reference to these hearings . . .

"It is very evident that there was a general misunderstanding among the Senators as to the proceedings upon which the House passed the amendment in relation to Drs. Watson, Dodd, and Lovett . . . The Senate has never been denied the opportunity 'to peruse the evidence.' The transcripts have been available at all times to any and all of the Members of the Congress and in a number of instances Members of Congress have called for these transcripts and have examined them. All the transcripts were turned over to Senator McKellar by the Clerk of the special subcommittee. The exhibits in these cases are voluminous and are and have been available to all Members of Congress, but to deliver them from one office to another would require trucks, or wheelbarrows to transport them. * * *

"In addition to this testimony taken before the Kerr committee there were several hundred pages of testimony taken before the Dies Committee and each of these men were examined by representatives of the FBI and by representatives of other committees and departments, all of which evidence is now and has been at all times available to the members of Congress or to other interested parties." * * *

"A great deal of confusion seems to have arisen in the minds of the Senators through the reading of the statement of Secretary Ickes which has been (also) broadcast throughout the Nation." (Cong. Rec., Vol. 89, P. 6012, 6013, June 15, 1943)

It was primarily at the insistence of the Attorney General that the material before the subcommittee, particularly that from the FBI and the Attorney General's Interdepartmental Committee, was treated as confidential by the Kerr Subcommittee.

Representative Keefe, a member of the subcommittee, explained to the House:

"... That much of the material furnished by the F.B.I. and the Army and Navy Intelligence was regarded as highly confidential and we assured them that if we

used if in our examinations it would not be made a public record." (Cong. Rec., May 18, 1943, Vol. 89, P. 4670)

The Kerr Subcommittee hearings contained only the sworn testimony of respondents in their own behalf. Material in the form of letters, memoranda, etc., was not included. Against the several letters written by respondents' friends in their behalf, there was a mass of material unfavorable to them. Exclusion of all this material was, obviously, proper; but if any error was made, it was of advantage only to respondents, since from their standpoint their own testimony was, obviously, the most favorable material the committee could have published.

It will be seen, therefore, that:

Respondents were not given a "public trial" or a "jury trial" because the proceedings were not, in any sense, a criminal or other judicial proceeding, but a legislative investigation.

Respondents were fully acquainted with the "charges" against them.

Respondents were not denied the assistance of counsel. They never asked for it.

Respondents were not denied an opportunity to produce witnesses or evidence. They all agreed they had been given the opportunity to produce anything they desired.

Respondents never requested the compulsory process of the subcommittee in their own behalf.

The only evidence submitted to Congress by the Kerr Subcommittee was that based upon admissions furnished by the respondents themselves.

The stipulations signed by the Attorney General and counsel for the respondents, which were incorporated in the Court of Claims' decision as findings of fact, completely negative any claim of lack of due process in the proceedings of the Congressional committee.

(b) *The Court of Claims Decision.*

The decision of the Court of Claims may be summarized briefly in the language of the court itself, as follows:

> "The claim made is only for *salary* of the office during the time of service, and no longer." (R. 36)
>
> " . . . in the case we have here Section 304 makes no attempt to change or do away with compensation attached to the offices held by the plaintiffs. It merely stopped payment in three specific instances . . . regardless of obligation . . . (R. 39, 40)
>
> "The statute did not separate the plaintiffs from office, it did not take away the salary of that office, it did not prohibit plaintiffs from receiving their salaries. The Act did not provide an appropriation for the payment of their salaries. The appropriation for the pay period was there, but it was not made use of. The plaintiffs were appointed lawfully, they continued in office lawfully. Section 304 is [in] no way disqualified them, and we can find no rational basis for construing the Act otherwise than as a mere stoppage of disbursing routine, nothing more. To construe it as something more is to volunteer inferences. Whether the Congress had the constitutional authority to stop payment, within the limitations of the Act, is immaterial. That which is material is that the salaries have not been paid, that the obligation was never destroyed, and that the obligation continues to this day." (R. 40)
>
> "In the conclusion arrived at, it is immaterial whether Section 304 . . . is constitutional or not. We do not decide that question. The plaintiffs are entitled to recover in either event." (R. 41)

With respect to respondents' contention that Section 304 makes respondents ineligible for future government employment, the court said:

> "But in the cases before us we have for consideration only one specified period of employment, and the conditions of that specific employment. We cannot introduce situations which are not before us, and which may indeed never come into being . . . *California* v. *San*

Pablo, etc., Railroad, 149 U. S. 308, 314." (R. 36, 37) "We are not here concerned with other situations; other times." (R. 38)

In short, the Court of Claims held that respondents were not removed from office, but based its judgment upon the erroneous assumption that respondents had occupied offices to which a fixed salary had been attached by statute, and that Congress did not intend by Section 304 to affect an obligation to pay respondents but merely to prevent payment by disbursing officers regardless of obligation.

In three separate concurring opinions, Judges Whittaker, Jones, and Madden expressed views which are admittedly difficult to reconcile with "the opinion of the Court," although wholly irrelevant to a consideration of these cases on writs of certiorari. While each of the concurring opinions expressed the view that Section 304 is repugnant to the Constitution, a majority of the court did not agree upon any common reason for such repugnancy. Moreover, since the official opinion of the court is clear and unambiguous, the separate views appended thereto are entitled to no more than the usual weight of dicta—or, in the language of Judge Madden, such views are merely "additional observations."[17] (R. 44)

IV.

SPECIFICATION OF ERRORS.

The Solicitor General's petition herein states the questions presented as follows:

> "1. Whether Section 304 of the Urgent Deficiency Appropriation Act, 1943, 57 Stat. 431, 450, *infra*, undertook to terminate the respondents' services, and not merely to prohibit disbursing agencies from paying their salaries.

[17] In any event, only one member of the court, Judge Madden, expressed the view that respondents were removed from the positions they held.

"2. If so, whether Section 304 is constitutional.

"3. Whether, in view of Section 304 and the failure of the President to appoint respondents thereunder, the United States incurred a legal obligation to pay respondents for services rendered after November 15, 1943.

"4. Was the Court of Claims presented with justiciable controversies."

It will be noted that the petition does not raise questions as to the constitutionality of the statute except in the event the court should conclude that Section 304 "undertook to terminate the respondents' services." Otherwise, the only questions raised by the petition are the third and fourth, above.

V.

ARGUMENT.

Summary of Argument.

The Court of Claims held that Section 304 did not undertake to remove respondents; it dealt with payment of compensation, not with office; respondents continued in their offices or positions after the effective date of the statute, and the present suits involved only a claim for salaries for a brief period following November 15, 1943, in each instance.

With this conclusion we agree. We do not question the decision of the court below in so far as it found that respondents' services were not terminated by Section 304.

Since Section 304 did not purport to remove respondents, the petition for certiorari does not present any constitutional questions requiring decision by this Court.

The Congress is of opinion that these cases do not present justiciable controversies.

We submit that the Court of Claims erred in holding that although Congress provided by Section 304 that respondents could not be paid for services after November 15,

1943, it nevertheless intended to leave the employing executives free to incur an obligation on the part of the United States to pay respondents for services after that date. We contend that the legal effect of Section 304 was not merely to prevent disbursement of funds but to limit authority of the respective employing agencies to create an obligation to respondents, that no obligation arose, and hence, the claims should have been dismissed.

It was clearly within the constitutional competency of Congress in its exclusive control over public funds to provide, as it did in Section 304, that no part of the public funds should be used to pay respondents after some future date. Such refusal on the part of Congress is supported by legislative precedents, has never been denied by the judiciary, and, particularly in view of the Court of Claims decision that no removal was effected, infringed no constitutional or legal right of plaintiffs and no prerogative of the executive department.

The Claim That Section 304 is Unconstitutional Does Not Present Justiciable Questions.

The respondents asked the Court of Claims to declare Section 304 unconstitutional. On behalf of Congress we contended before the Court of Claims that questions regarding the constitutionality of Section 304 are not justiciable. That court did not pass on the constitutional issues and rendered no ruling on the question of justiciability.

In the petition for the writs of certiorari, the Solicitor General requests this court to rule on the constitutionality of the provision, if it be found that its effect was to remove respondents from office. At our request the Solicitor General included among the questions presented in the petition for writs of certiorari the question, "Was the Court of Claims presented with justiciable controversies?" That question was raised at our request, and logically precedes all others in the petition.

It is our contention that questions regarding the constitutionality of Section 304 are not justiciable, because they are political in nature.

Section 304 was a plain and unequivocal mandate to all disbursing agencies directing them not to withdraw moneys from the public Treasury after November 15, 1943, in order to pay respondents, unless the stipulated condition was met. Regardless of respondents' assertions concerning the effects of that prohibition on the rights and privileges respondents alleged they possessed, the provisions was an order from the legislative branch to the disbursing agencies of government not to disburse funds from the Treasury for a particular purpose. The Court of Claims said:

> "The closer the statute is examined, the more clearly does it appear that with reference to the particular situation we have here, Congress confined itself to one thing—prohibiting disbursing agencies from paying the salaries of the plaintiffs." (R. 37)

A request that the court declare that action unconstitutional is a request that the judiciary countermand the order. An effective judgment that Section 304 is unconstitutional would deny to the legislature the power to prohibit the disbursement of public moneys to respondents. As stated in *Norton* v. *Shelby County*, 118 U. S. 425, 442; 30 L. ed. 178, 186, an unconstitutional law is "in legal contemplation, as inoperative as though it had never been passed."

If questions regarding the constitutionality of Section 304 are justiciable, the court therefore must possess the power to declare inoperative a statute which prohibits the disbursing agencies from spending money for a purpose for which the Congress has determined expenditures shall not be made.

The exclusive control over disbursements of funds in the public Treasury is vested in the Congress by reason of the constitutional provision that:

> "No money shall be drawn from the Treasury but in consequence of appropriations made by law." (Article I, Section 9, Clause 7)

Neither the judicial nor executive branches of government may withdraw any part of such funds for any purpose except pursuant to an appropriation made by the legislature. *Hart* v. *US*, 16 C. Cls. 459, 484, Affirmed 118 US 62; *Reeside* v. *Walker*, 11 Howard 272, 291; *Knote* v. *United States*, 95 US 154; *Osborn* v. *US*, 91 US 474; *Cincinnati Soap Co.* v. *US*, 301 US 308; *Spaulding* v. *Douglas Aircraft*, 60 F. Sup. 985; *Collins* v. *US*, 15 C. Cls. 22. Congressional control over the disbursing process is exclusive and complete.

The court therefore may not declare inoperative a statute which forbids the executive agencies of government to withdraw funds. Such a decision would be a clear intrusion upon the exercise of a function committed solely to the legislature and not subject to review or modification by the judiciary. *Spaulding* v. *Douglas Aircraft*, *supra*, is directly in point. In that case the company sued for a declaratory judgment, declaring the Renegotiation Act (50 USCA, App. Sec. 1191) unconstitutional. Dismissing the action for failure to state a justiciable controversy, the court said:

> "Congress in making appropriations has the power and authority not only to designate the purpose of the appropriation, but also the terms and conditions under which the executive department of the government may expend such appropriations. Thus the War Department was required to make the Renegotiation Act a part of all its contracts.
>
> "The purpose of the appropriations, the terms and conditions under which said appropriations were made, is a matter solely in the hands of Congress and it is the plain and explicit duty of the executive branch of the government to comply with the same. Any attempt by the judicial branch of our government to interfere with the exclusive powers of Congress would be a

plain invasion of the powers of said body conferred upon it by the Constitution of the United States."

Examination of the circumstances under which the constitutional questions are presented in these cases illustrates the applicability of the doctrine there declared and the non-justiciable character of the issues raised. Prior to the enactment of Section 304, as the respondents Watson and Dodd in their petitions stated, the Secretary of the Federal Communications Commission was authorized "to approve before presentation for payment itemized vouchers for all expenditures of the Federal Communications Commission which may be necessary for the execution of its functions, including compensation to plantiff, and which may be appropriated for by Congress, as provided by the Communications Act of 1934 (48 Stat. 1066, as amended, 47 USCA Sec. 154(g))" (R. 8, 13)

Prior to the enactment of Section 304, as respondent Lovett stated, the Secretary of the Interior or someone acting on his behalf had the duty of signing all requisitions for the advance or payment of money out of the Treasury for expenditures upon business of the department, including expenditures for the administration of the Virgin Islands, and including expenditures for the payment of respondent's salary as provided by the revised statute, Section 44, as amended, 5 USCA 487, and the Act of June 22, 1936, 49 Stat. 1813, 48 USCA Sec. 1405v. (R. 2). Section 304 ordered those agencies not to "use" any of the moneys appropriated for them in order to compensate respondents after November 15, 1943. It operated to curtail the disbursing power previously granted them.

An effective judgment that Section 304 is unconstitutional would make Section 304 inoperative for any purpose from the date of its enactment, and under the prevailing circumstances would amount to a judgment that on and after November 15, 1943, the executive agencies concerned were, by reason of the earlier legislation, empowered to

withdraw funds in order to pay respondents. If binding on the Congress, and judgments within the constitutional power of the court to make are binding on the legislature, the judgment would operate to overrule the Congress and countermand the order contained in Section 304 prohibiting such disbursements.

Thereby the court indirectly would be exercising a control which belongs exclusively to the legislature. The statement by Mr. Justice Black in *Coleman* v. *Miller*, 307 US 433, 459 is directly in point. Referring to the exclusive power Congress possesses over the amending process of the Constitution, in a concurring opinion in which he was joined by Mr. Justice Roberts, Mr. Justice Frankfurter and Mr. Justice Douglas, Mr. Justice Black declared:

> "Congress possessing exclusive power of the amending process cannot be bound by and is under no duty to accept the pronouncements upon that exclusive power by this court or by the Kansas courts. Neither state nor federal courts can review that power. Therefore any judicial expression amounting to more than a mere acknowledgment of exclusive congressional power over the political process of amendment is a mere admonition to the Congress in the nature of an advisory opinion, given wholly without constitutional authority."

When Congress exercises its exclusive power over the disbursing process as it did in Section 304, its action is not subject to review or revision by other departments of government, and questions concerning the constitutionality of its action are not justiciable.

Section 304 Prevented the Executive Agencies From Creating Any Obligation to Pay Respondents for Services Performed After November 15, 1943.

The Court of Claims held that Section 304 did not affect the obligation to compensate respondents for services performed after November 15, 1943, although it effectively

prevented the payment to them of any money by the Federal Communications Commission or by the Secretary of the Interior during that period. In the opinion of the court, the provision was not intended to disturb the obligation, but merely to prevent the transmittal of funds to which the respondents might become entitled.

The court's opinion indicates that the conclusion was based entirely upon the court's construction of the statutory language. Referring to the use of the word "available" in Section 304, the court decided that money was available to pay the salaries in question and the provision was merely "a direction not to pay for the isolated services here rendered." (R. 36)

The Court of Claims expressly found that Section 304 did not remove respondents from office (R. 37); did not remove the compensation from the offices they properly held (R. 40); and did not constitute a refusal to appropriate for the payment of compensation affixed to those offices, as distinguished from payment to the respondents (R. 40). Having thus concluded, the court was impelled to find

> "... that it is impossible to conclude that Congress meant that in the final outcome, service was to be free to the Government because the plaintiffs were, in its opinion let us say, unfit for office. It is plain that the plaintiffs, if unfit, were just as unfit serving the Government for nothing, as serving it for something. There is no logic to the proposition that the plaintiffs were to serve the Government for nothing. The proposition is irrational. Unfitness could not be converted into fitness by withholding salary. Yet the statute allowed these plaintiffs to continue in office." (R. 38)

However, it may be noted that the decision of the court, to wit, that Section 304 did not disturb the obligation to compensate respondents, necessitates the abhorrent conclusion that when it enacted Section 304 the Congress intended to leave the power of the Federal Communications Commission and the Secretary of the Interior to create an

obligation untouched, and at the same time to serve advance notice that the Congress would not honor the valid obligations resulting from its exercise.

It is a well-established rule that the court may not refuse to give effect to legislation merely because the judiciary deems the result anomalous. *United States* v. *Barringer*, 188 U. S. 577, 580; 47 Law. Ed. 602, 604. Authority supports the proposition that under the circumstances present in these cases the Congress may, by the method adopted in Section 304, prevent the creation of an obligation to pay for future services. It is submitted, therefore, that the decision of the Court of Claims which necessitates the premise that the legislature intended to repudiate a valid obligation of the government cannot be sustained.

The opinion of the Court of Claims evidences a disposition to regard the legislative power concerning compensation of officers and employees of the government as one applicable only to office and position, and not as one exercisable in personam. However, examination of the constitutional powers regarding office, appointment, compensation and expenditure of the public funds reveals that that premise is untenable.

The Constitution itself creates certain offices and delegates to the President the power to appoint "ambassadors, other public ministers and consuls" by and with the advice and consent of the Senate. (Article II, Section 2, Clause 2). All other offices and positions in the federal government are created directly or indirectly by the legislature. *Cochnower* v. *U. S.*, 248 U. S. 405, 63 Law. Ed. 328; *Glavey* v. *United States*, 182 U. S. 595, 45 Law. Ed. 1247; *United States* v. *Andrews*, 240 U. S. 90, 60 Law. Ed. 541.

Compensation is not a constitutional incident of any office or position resulting from legislative action. The Constitution vests a right to compensation in the President (Article II, Section 1, Clause 6) and in the judges of the federal courts (Article III, Section 1). In all other cases the legislature has exclusive control over compensation.

In *Embry* v. *United States*, 100 U. S. 680, 685, 25 Law. Ed. 772, 773, a case in which the court denied the claim of a suspended postmaster for salary, the court said,

> "The question here presented is not one of office, but of salary. Wherever the power of removal from office may rest, all agree that Congress has full control of salaries, except those of the President and the Judges of the Courts of the United States. The amount fixed at any one time may be added to or taken from at will. No officer except the President or a Judge of a Court of the United States can claim a contract right to any particular amount of unearned compensation. If an officer is not satisfied with what the law gives him for his services, he may resign." (See also United States v. McDonald, 128 U. S. 471; 473; 32 Law. Ed. 506, 507).

The doctrine that office and compensation are separable clearly declared in the Embry case is applicable to those diplomatic offices created by the President pursuant to the delegation of authority contained in the Constitution. While it is recognized that Congress can place no limitation on that power to appoint diplomatic agents, the courts have held that the power to determine matters relating to their compensation belongs exclusively to the Congress.

In *Matthews* v. *United States*, 123 U. S. 182; 31 Law. Ed. 127, the court held that the Congress could reduce the salary of a consul by a reduction of appropriations, coupled with a declaration of its intention that the reduced amount should constitute full salary. Compare *United States* v. *Langston*, 118 U. S. 389, 394; 30 Law. Ed. 164, 165.

In *Byers* v. *United States*, 22 C. Cls. 63, the court declared,

> "It has been claimed by the executive, in accordance with the opinion of Attorney General Cushing, that by the Constitution to the executive alone is granted the power to appoint diplomatic agents of any rank or title, at any time, and at any place, and upon the exercise of this power Congress can place no extension or limitation, by undertaking either to create, abolish, or change

> the character, title, or rank of officers. On the other hand, to the legislative branch of the government alone is granted the power to provide for the compensation of these as well as of all other public officers, and this it may do in such manner as it deems best, or may withhold all compensation whenever it sees fit to do so."

Also pertinent is Wood's case, 107 U. S. 414; 27 Law. Ed. 542. In that case the court affirmed the view that officers on the retired list of the Army compose part of the Army and, therefore, no one can be upon that list who is not an officer appointed as required by Article II, Section 2 of the Constitution. The court further held however that Congress could change his rank and pay, holding that such changes would not affect the office.

It is well established, therefore, that compensation is not by reason of the Constitution an inseparable incident of office, and the power to appoint does not by reason of the Constitution include the power to compensate. The granting of compensation, except in regard to the President and the judges of the federal courts, is a matter completely within the constitutional control of the legislature which may exercise its power "in such manner as it deems best, or may withhold all compensation whenever it sees fit to do so." *Byers* v. *United States, supra.*

We submit that since the power to appoint and the power to compensate are separate and distinct, the Congress may act in regard to compensation without impinging on the executive authority; and since compensation is not a constitutional incident of office, the Constitution imposes no requirement that the power of Congress regarding compensation may be exercised only in regard to office.

An incumbent of any office or position, other than the Presidency or federal judgeship, acquires a right to unearned compensation at the sufferange of the legislature. The legislature may reduce or eliminate compensation, without affecting the existence of the office or position, and without disturbing the executive power of appointment and removal.

The Embry case, *supra*, recognized this principle by declaring that no incumbent of a legislatively-created office can claim a contract right to "any particular amount of unearned compensation" and "if an officer is not satisfied with what the law gives him for his services, he may resign." Also pertinent are the numerous other cases holding that Congress may reduce compensation of an office or position at any time, and incumbents may not claim a higher amount. *Matthews* v. *United States*, *supra*; *United States* v. *McDonald*, *supra*; *Mississippi ex rel Robertson* v. *Miller*, 276 U. S. 174, 72 Law. Ed. 517; *United States* v. *Mitchell*, 109 U. S. 146; *United States* v. *Fisher*, 109 U. S. 143; *Dodge* v. *Board of Education*, 302 U. S. 74, 78; 82 Law. Ed. 57, 62.

In the Dodge case, the court explained the controlling doctrine as follows:

> " . . . an act merely fixing salaries of officers creates no contract in their favor and the compensation named may be altered at the will of the legislature. This is true also of an act fixing the term or tenure of a public officer or an employee of a state agency. The presumption is that such a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise. He who asserts the creation of a contract with the state in such a case has the burden of overcoming the presumption. If, upon a construction of the statute, it is found that the payments are gratuities, involving no agreement of the parties, the grant of them creates no vested right."

Because a statute fixing compensation is in legal effect merely a declaration of policy by the legislature, it follows that the Congress may eliminate compensation at its discretion.

The Constitution does not compel the granting or maintenance of salary for any officer or employee of the government, other than the President and judges of the courts. The numerous decisions referred to above recognize that Congress has complete control over the subject of com-

pensation. And it is significant to note that in 1795, discussing the constitutional provision regarding compensation for the President, Alexander Hamilton wrote as follows:

> The manifest object of the provision is to guard the independence of the President from the legislative control of the United States or of any state, *by the ability to withhold*, lessen, or increase his compensation. (Hamilton's Works, edited by John C. Hamilton, Vol. VII, p. 538) (Italics supplied)

Implicit in that observation is recognition of the constitutional power of Congress to withhold salary from any officer or employee not deriving his compensation from the Constitution.

As a matter of fact, there are many thousands of government employees working without compensation. The "Monthly Report of Employment—Executive Branch of the Federal Government," published by the United States Civil Service Commission, reporting for January, 1945, states,

> . . . there were 311,000 uncompensated employees at the end of January . . .

The Commission explains that number included those employed "WOC" (presumably, "Without compensation") and those employed at one dollar per annum.

There remains for consideration the question whether the Congress in dealing with compensation must deal with offices and positions, or may deal in personam.

Analysis of this question best can be made by considering it in relation to the circumstances present in these cases.

As previously noted, the Federal Communications Commission appointed respondents Watson and Dodd pursuant to statutory authority "subject to the provisions of the civil service laws and sections 661 to 674 of Title 5, to appoint such other officers, engineers, accountants, inspectors, attorneys, examiners, and other employees as are necessary.

in the execution of its functions." USCA, Sec. 154(f). Its authority to compensate employees so appointed is contained in the further statutory provision that "the Commission may make such expenditures (including expenditures for rent and personal services at the seat of government and elsewhere, . . .) as may be necessary for the execution of the functions vested in the Commission and as from time to time may be appropriated for by Congress . . . ." 47 USCA, Sec. 154(g).

In accordance with the requirements of 47 USCA, Sec. 154(f), the positions created by the Federal Communications Commission, pursuant to the delegated authority to engage necessary personnel, and to which respondents were appointed, were classified under the Classification Act of 1923 (5 USCA, Secs. 661-674) and respondents were assigned rates of compensation as therein provided (5 USCA, Sec. 664).

Respondent Lovett was appointed by the Secretary of the Interior pursuant to statute empowering him to

> ". . . appoint such other executive and administrative officers as may, in his discretion, be required. Such officers shall have such powers and duties as may be conferred or imposed upon them by law or ordinance, or by order of the Secretary of the Interior or executive regulation of the Governor not inconsistent with any such law or ordinance. The salary of all executive officers and employees appointed by the President or by the Secretary of the Interior shall be paid from funds appropriated for the Government of the Virgin Islands by the Congress in annual appropriations bills, or as may be otherwise provided by law. The officers appointed by the Secretary of the Interior shall hold office during his pleasure, and in making such appointments the Secretary shall give due consideration to natives of the Virgin Islands." (48 USCA, Sec. 1405v).

His compensation was fixed pursuant to statutory provision authorizing the President to fix the compensation of such appointees. 48 USCA, Sec. 1391.

Therefore, all of the respondents occupied offices or positions created by the executive agencies pursuant to general statutory authority to engage necessary personnel. None occupied an office or position created directly by the legislature.

The rates of compensation to be received by all of the respondents were fixed by the executive agencies, in accordance with the functions and duties assigned them by these executive agencies. In the cases of respondents Watson and Dodd the Federal Communications Commission acted within the limits imposed by the Classification Act of 1923. In the case of respondent Lovett, rate of compensation was fixed at discretion of the President.

None of the respondents occupied an office or position to which Congress had directly affixed a specified compensation.

Each of the respondents received any right to compensation he possessed from the exercise of authority which Congress conferred upon the employing agencies to expend public moneys for necessary personal services. The Federal Communications Commission derived its power to compensate from the provision authorizing it to expend for personal services such sums as Congress might appropriate. 47 USCA, Sec. 154(g). The power of the Secretary of the Interior to compensate his appointees was limited by the provision that their compensation should be paid from particular moneys furnished by Congress. (48 USCA, Sec. 1405v)

Any other construction would nullify those specific provisions as to payment of compensation. If they should be construed as merely prohibiting actual expenditures, without limiting the power of the agencies to create an obligation for compensation, the effect would be to hold that the agencies without limit might create obligations to pay for personal services. To illustrate, assume that Congress appropriating money for the Federal Communications Commission should provide that each appointee shall receive

$2000, and appropriated a total amount of $1,000,000 for personal services. Under the construction that 47 USCA, Sec. 154(g) does not limit power to create an obligation to compensate, the Federal Communications Commission could employ 250 employees at $4000 per annum each, thus ignoring a plain intention of Congress to control compensation, and could commit the Congress either to make expenditures of public moneys contrary to its direction, or to repudiate valid obligations of the United States.

Again to illustrate, assume that Congress appropriating for the Federal Communications Commission should provide a total of $1,000,000 to be expended by the Commission for the purposes specified in 47 USCA Sec. 154(g). Under the construction made by the Court of Claims, the Commission could appoint any number of persons it saw fit and create a total obligation for salaries far in excess of the $1,000,000 appropriated. Thus, it could commit the Congress either to expend far greater amounts than the Congress deemed necessary or to repudiate valid obligations of the United States. This is exactly the result the Anti-Deficiency Act was intended to prevent.

Such a construction, therefore, would negate the clear purpose of 47 USCA Sec. 154(g) and 48 USCA Sec. 1405v, which, we submit, is to limit the delegated compensating power granted the executive agencies. In other words, under the statutes controlling in these cases the power to expend was an indispensable element of the power to compensate. And the power to spend, in turn, was dependent on congressional appropriations.

We are not here concerned with a situation in which claimants occupied statutorily-created offices to which Congress appended a specified salary. Under such circumstances, a mere failure to appropriate does not affect the right of an incumbent to the designated salary. See *United States* v. *Langston*, 118 U. S. 389, 30 Law. Ed. 164; *United States* v. *Vulte*, 233 U. S. 509, 58 Law. Ed. 1071.

We are here dealing with situations in which a failure to appropriate would prevent the executive agencies

from creating any future obligation to compensate appointees in the categories in which respondents were appointed. The power to compensate was delegated in the power to expend conferred upon the agencies, and expressly limited by the statutory provisions that they might expend for such purposes only the sums provided by Congress.

Where Congress delegates the power to disburse public funds, it may revoke or curtail that authority by asserting its control over appropriations.

Dickerson v. *United States*, 310 U. S. 554, 555; 84 Law. Ed. 1356, 1359, involved a claim for an enlistment allowance under section 9 of the Act of June 10, 1922 (10 USCA, Sec. 633). In 1938, Congress appended to the appropriation for the Rural Electrification Administration a provision that "no part of any appropriation contained in this or any other Act for the fiscal year ending June 30, 1938, shall be available for the payment of reenlistment allowances for reenlistments during the fiscal year ending June 30, 1939. Since claimant had reenlisted on July 22, 1938, the court held the claim defeated, the limitation in the Appropriation Act operating as an amendment to the former law.

In *Dunwoody* v. *United States*, 143 U. S. 578, 586; 36 Law. Ed. 269, 272, claimant sued to recover compensation for services rendered as a member and clerk of the National Board of Health, created in 1879. Affirming a judgment of the Court of Claims dismissing his claim, the court said:

> "These enactments evince the purpose upon the part of Congress not to create any liability upon the part of the United States, in respect to the work of the National Board of Health, beyond the amounts specifically appropriated by it from time to time for that work. This purpose, if not clearly indicated by the Act of 1879 establishing the board, became manifest before the plaintiff rendered the services for which, in this action, he claims compensation, not upon implied contract. If the plaintiff is equitably entitled to be paid for any of the services in question rendered by him as a member of the board, and if the special appropriation made for the salaries and expenses of its officers and employes

> have been exhausted, his appeal must be made to Congress. Looking at all the acts of Congress passed before he became a member of the board, it is clear that he did not perform services as such member under any implied contract that he should be compensated otherwise than out of the money specially appropriated to meet the expenses incurred by the board in the performance of the duties imposed upon it. In other words, that board has no authority to incur any liability upon the part of the government for salaries or other expenses in excess of the amounts appropriated by Congress for such purposes.
>
> These views dispose of the case, adversely to the plaintiff, as to his claim for compensation as a member of the board. There is still less ground for a judgment in his favor in respect to services rendered as chief clerk, disbursing agent, and secretary. Congress never intended to incur liability for such services beyond the sums appropriated from time to time for the work of the board of health."

In these cases the Federal Communications Commission and the Secretary of Interior derived their power to compensate from delegated authority to expend federal funds, and since it is established that Congress may curtail such authority by control over appropriations, the question whether Congress could by Section 304 prevent the creation of an obligation to pay respondents for personal services after November 15, 1943, resolves itself into the question whether Congress could limit the *use* of appropriated moneys as it did in Section 304. If the limitation on expenditures there imposed was valid, then the expending power of the executive agencies was correspondingly curtailed and they possessed no authority to create an obligation to pay the respective respondents for services performed after that date. Obviously Congress did not intend to prevent payment to respondents and leave authority to obligate the Government for such payment.

We have demonstrated elsewhere that under Article I, Section 9, Clause 7 of the Constitution, Congress

possesses plenary power to direct and control the expenditure of public funds. There is nothing in the Constitution to prevent the legislature from designating the persons who shall receive and who shall not receive public moneys. Congress exercises absolute control over the public moneys.

We submit that exercising the power it expressly retained by 47 USCA, Sec. 154(g) and by 48 USCA Sec. 1405v, to direct and control the expenditures of the Federal Communications Commission and the Secretary of the Interior, Congress could have required those agencies to furnish lists of their appointees, and could have appropriated the compensation to be paid each of them by name. Thus, by utilizing specific appropriations, Congress could determine the amount of compensation to which each appointee might become entitled, and by refusal to appropriate for any named individual could prevent him from securing any right to compensation for future services.

There is nothing in the Constitution which prohibits the legislature from so exercising its acknowledged power over compensation and over the expenditure of public funds; but the size and complexity of modern government makes that method impractical, and necessitates use of lump-sum appropriations.

However, when Congress utilizes lump-sum appropriations as it did in these cases, and specifies the persons to whom none of the money may be paid, it asserts exactly the same constitutional power to direct and control expenditures. We submit, therefore, that Section 304, which was a valid limitation on the use of appropriated money, prevented the Federal Communications Commission and the Secretary of the Interior from granting the respective respondents any right to compensation for services performed after November 15, 1943, and that there was no legal obligation of the Government to pay any compensation for such period. Hence, Section 304 could not properly be held to have destroyed or repudiated an existing legal obligation, and judgment below should have been for the United States.

Section 304 Did Not Terminate Respondents' Services.

The Court of Claims found as a matter of fact and held as a conclusion of law that respondents' *services* were not terminated by the Congress in enacting Section 304.[1]

In its findings of fact, based upon stipulations signed by each of the parties, the court determined that respondent Watson *resigned* not because of Section 304, but for the reason that, "The reduction in appropriations for the Foreign Broadcast Intelligence Service makes necessary the elimination of the Analysis Division . . ." (R. 24)

The court's finding of fact also contains a communication from respondent Watson's executive superior, advising that because of the reduction in funds the position held by Watson, "has been eliminated," and that his "resignation coming in this way makes it very clear cut that the act is voluntary." (R. 25)

Respondent Dodd continued as an employee on the rolls of the Federal Communications Commission through November 21, 1943, and like Watson, he resigned not because of Section 304, but because his position in the same division was abolished by his executive superiors in line with a reduction in appropriations for the Foreign Broadcast Intelligence Service.

Respondent Lovett was not removed by Section 304. He resigned at the request of the Secretary of the Interior,

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[1] The separate concurring views of Judges Whitaker and Jones do not hold that by Section 304 Congress removed respondents from their positions. Judge Whitaker found "it unnecessary to consider . . . whether it amounted to a removal of these men from office." (R. 42)

Judge Jones makes no objection to Section 304 on the ground that it removed respondents from the positions they held and said that he would have no doubt as to its constitutionality "If Section 304 merely forbade the use of funds in the bill, or other funds already available in other bills . . ." Judge Jones' objections are apparently based upon the erroneous view that Section 304 prospectively denies each of the respondents a constitutional right "to apply for any position within the Government and to have his application considered on its merits".

after continuing in his position without compensation for approximately four months after the President's failure to appoint him under Section 304.

Aside from the above findings of fact, the court held as a matter of law that:

> "It [Section 304] did not terminate plaintiffs' services." (R. 36)
>
> "As special counsel contend, Congress did not remove from office." (R. 37)

Elsewhere throughout its opinion, the court said:

> "The statute did not separate the plaintiffs from office . . . The plaintiffs were appointed lawfully, they continued in office lawfully." (R. 40)
>
> "There is nothing in Section 304 which disturbed plaintiffs' incumbency in office." (R. 36)

The court further stated:

> "It may be repeated that here we have . . . solely a claim for the as yet unpaid salary of an office, the duties of which have been performed by the undisputed holders of that office. These are not suits for reinstatement to office." (R. 37)
>
> "There was no removal of the officer from the office . . ." (R. 37)
>
> "The obvious circumstance that the section was dealing with was one where the plaintiffs were legally and actually in office. Section 304 did not remove them. • • • The statute allowed these plaintiffs to continue in office. • • • In other words, as special counsel observe, the section did not remove them from office."

Respondents in the lower court recognized that "literally, of course, it is not a removal of the plaintiffs from the posi-

tions which they held. The positions remained unaffected, and plaintiffs continued for a time in those positions, carrying on the work which they had been appointed to do. But the section varies from an outright removal only because it is framed in the language of a refusal of appropriations."

The Implied Executive Power to Remove Certain Officers was not Infringed by Section 304.

If respondents were not removed, the power of removal is not here involved. However, since the petitioner has raised the question, the following observations seem appropriate.

The Solicitor General and the respondents admit that the Constitution does not grant any express executive power of removal. Even the executive power of *appointment* granted by the Constitution is confined by that instrument to

> "Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other *Officers* of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law" (Article II, Section 2)

This authority to appoint does not extend beyond "Officers of the United States," and it is modified by the power of the Senate to refuse concurrence. The same section provides that:

> "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments" (Article II, Section 2)

The Attorney General admitted in the court below that Respondent Lovett, whose appointment was vested by Congress in the Secretary of Interior, was, at most, an

"inferior Officer" within the meaning of the Constitution. Respondents Watson and Dodd were employees whose appointments were vested by Congress in the Federal Communications Commission. Their positions were clearly and solely creatures of the legislature.

Assuming that an exclusive power to remove respondents is implied by the general executive power of the President,[18] these cases would then present a conflict between the claimed *implied* executive power to remove inferior officers, or employees, and the plenary legislative power to control the expenditure of public funds under Article I, Section 9,[19] and Article I, Section 8,[20] of the Constitution. This Court is asked to set aside the exercise of an express power in favor of a claimed implied power.

The position of the Congress is further supported by Article I, Section 8, which, having granted the exclusive power to control expenditure of public funds, further authorizes the legislative branch

> "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers"

It is important to understand at the outset what Sec. 304 provided and what it did not provide. It provided that after November 15, 1943, no public moneys were to be available to pay any part of the salaries of the three named individuals if prior to November 15, 1943, they had not been appointed by the President, by and with the advice and consent of the Senate.

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[18] Respondents stated before the Court of Claims that the *Myers* case, 272 U. S. 52, had no application here, although they cite certain dicta therein.

[19] "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."

[20] "The Congress shall have Power . . . to pay the Debts . . . of the United States." We note, in passing, that this section does not require Congress to *delegate* authority to pay obligations of the government; it provides that Congress *itself* "shall have Power . . . to pay the Debts . . . of the United States."

This placed no compulsion upon the Executive. He was free to appoint in accordance with the statute, or he was free to do nothing whatever under the statute. The Congress said to him in effect: "'If you elect to appoint in accordance with Sec. 304, and the Senate elects to advise and consent, the funds will be available. If you decide to do nothing, the funds will not be available."

The President in fact elected to do nothing under the statute. The determination of the Congress to withhold the funds thereupon became effective after November 15, 1943.

It has been suggested by respondents that:

> "The President, believing that the rider was unconstitutional, and not binding upon him, took no action under it. Presidential appointments of Messrs. Lovett, Watson and Dodd under the proviso in Section 304 would have been wholly inconsistent with the President's belief that the law *was ineffective for any purpose*." (Italics supplied)

Since the President did not elect to make the appointments, it is immaterial from a legal standpoint what motives may have prompted him. Respondents' interpretation of his state of mind, however, is negatived completely by the fact that the executive agencies *treated Section 304 as fully effective* after November 15, 1943, by recognizing that the withholding of funds was operative, and by failing to certify respondents' salaries after that date for payment.

Section 304 provided that no funds should be available to pay the salaries of these three persons after November 15, 1943, if prior to that date they had not been appointed by the President, by and with the advice and consent of the Senate. The President took no action under Section 304 prior to November 15, 1943. He has not undertaken

to appoint either of plaintiffs since November 15, 1943. The injury claimed by them in the present suits does not flow from the fact that he *could* not appoint after November 15, 1943, even if that were conceded, but from the fact that he *did* not appoint prior to November 15, 1943.

Because of Section 304 *and the fact that the President did not appoint thereunder*, there were no appropriations available to pay respondents after November 15, 1943.

The Act under inquiry did not constitute an unconstitutional infringement upon the prerogatives of the Executive with respect to removal of public officers or employees.

It is well to bear in mind that this was not a legislative removal; that it did not affect "the office" as distinguished from "the salary;" and that in fact respondents were not removed by the Executive, either as a result of the statute, or otherwise. (R. 24, 29, 32)

If it be insisted that the Act, although not constituting or effecting a removal, is nevertheless invalid as requiring the President to exercise his constitutional function of appointing by putting a time limit upon him, the answer is simply this: The statute did not require the President to do anything. It did not require the President to appoint by November 15th, or by any other date, or at all. It merely informed the executive department of the Government that it was not to pay out any funds to the persons named in the statute or obligate the Government therefor if the condition laid down in the statute was not met. The alternatives which the President had were to appoint in accordance with the statute, in which case funds would be available for salaries, or to do nothing, in which event no obligation could be incurred and no funds available for respondent.[21]

[21] Ewing v. United States, 35 C. Cl. 374, 286—" . . . where a claim is by statute made to depend upon the previous action of an executive officer no right vests until that officer has acted." cf. McLean v. United States, 95 U. S. 750; Birdsong v. United States, 34 C. Cl. 437.

Respondents stated in the court below:

> "The instant case in no way involves the issue decided in the Myers case[22] as to the power of Congress to limit executive removals."

Notwithstanding this admission as to inapplicability of the doctrine of the *Myers* case to the present case, respondents devoted a large part of their argument below to a discussion of the Myers decision, and to asserting the right of the Executive to remove Federal officers. The Attorney General likewise devoted a large portion of his argument to the same proposition.

We do not think it necessary, in view of the fact that plaintiffs were not removed, *at all*, to argue at length the question of where the power of removal resides. We accept for present purposes the complete authority of the Myers case, as far as it decided the question therein presented. It is recognized by all who have studied that decision that it leaves unanswered many questions as to the removal of minor employees.

The broad sweep of the Court's language in the Myers case has been widely criticized. The Supreme Court itself, in *Humphrey's Executor (Rathbun)* v. *United States*, 295 U. S. 602, 626-628, has interpreted the Myers decision as follows:

> "Nevertheless, the narrow point actually decided was only that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate, as required by act of Congress. In the course of the opinion of the court, expressions occur which tend to sustain the government's contention, but these are beyond the point involved, and therefore, do not come within the rule of stare decisis.

[22] Myers v. United States, 272 U. S. 52.

In so far as they are out of harmony with the views here set forth, these expressions are disapproved.

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"The actual decision in the Myers case finds support in the theory that such an officer is merely one of the units in the execut e department and hence inherently subject to the exclusive and illimitable power of removal by the chief executive, whose subordinate and aid he is. Putting aside dicta, which may be followed if sufficiently persuasive but which are not controlling, the necessary reach of the decision goes far enough to include all purely executive *officers*. It goes no farther;—much less does it include an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President." (Italics supplied)

From this it will be noted that the Myers decision is limited to removal of "purely executive officers" and does not deal with those who exercise "no part of the executive power vested by the Constitution in the President." It does not deal with the removal of civil service employees generally, nor deny the possibility that Congress may have a voice in their removal. Certainly Congress has throughout our history made numerous and detailed provisions with respect to removal of such employees.[23]

In any event, the Myers case, and the later case of *Humphrey's Executor* v. *United States*, dealt with situations in which Congress had endeavored to limit the President's power of removal. In section 304 Congress merely withheld funds for salaries; it left the President entirely free to exercise his right of removal, without Congressional interference. He could have removed respond-

[23] For an elaborate resumé of such provisions, see the dissenting opinion of Mr. Justice Brandeis in the Myers Case, which Mr. Justice Frankfurter has described as an example of "critical rigor."

ents the next day, so far as Section 304 was concerned. Respondents do not claim that any vested legal rights would have been impaired by Executive removal on November 15, 1943, or that such removal would have denied them due process. This illustrates that the issue herein is primarily political, that is, it involves primarily questions of jurisdiction as between the Executive and Legislative departments of the Government rather than questions between the Government and the respondents.

Both the Myers and Humphrey cases involved actual removals from office by the Executive. The present case does not involve removal by anyone.

Neither the Myers nor the Humphrey case involved an exercise of the power of Congress over public funds. The present case does.

Even if the refusal of Congress to appropriate might be said to affect incidentally the continuance of respondents in office because they are unable or unwilling to continue without compensation, the injury to them is at most a consequential injury from the exercise of public authority, and presents no justiciable controversy to the courts.

There would be a wide distinction between a statute which had such an incidental effect, leaving the Executive entirely free to exercise his power of removal, and one such as that in the Myers case, which required the President to keep someone he felt could not aid him in the discharge of his duties. Furthermore, although it is agreed that no removal took place, if it can be said, as respondents argue, that that was the necessary and inevitable result, it must be borne in mind that the result flowed not merely from the action of Congress, but from the President's approval of the Act and his failure to appoint thereunder.

If Section 304 can be said to impose any restriction whatever on the President, it was not a restriction upon his implied right of removal, but upon his right to perpetuate respondents on the Federal *payroll*. The Section dealt with salaries, not offices. The contention that the two are

inseparable has no support in the Constitution or in judicial precedents.[24]

(a) *The Claim That Impeachment Was Necessary.*

Respondents have argued that the only means by which Congress is authorized by the Constitution to deal with the situation here involved is by impeachment. They cite Article I, Section 2, Clause 5—

> "The House of Representatives * * * shall have the sole Power of Impeachment."

They also cite Article II, Section 4—

> "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."

While it is clear that the Court below was correct in holding that respondents were not removed, we comment briefly on the history and purpose of these provisions. The former provision clearly means that no branch or agency of Government *other* than the House of Representatives shall have the power of impeachment. The latter provision clearly means that civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

The proceedings before the Kerr subcommittee were not in any sense criminal proceedings. The Court below held that they were not an attempted exercise of judicial power (R. 39). They were a legislative investigation into a subject matter over which Congress clearly has authority.

Respondents were not accused of "treason, bribery, or other high crimes and misdemeanors." The resulting legislation (Sec. 304) was not retroactive in application. It

[24] Cf. Embrey v. United States, 100 U. S. 680.

did not undertake to punish respondents for past conduct, either in or out of public office or employment. It was not to become effective until a future date, and then only if the condition therein contained was not met. It was a fiscal measure, controlling the expenditure of public funds, was not a "rider"[25] to an appropriation act, but a relevant proviso, germane to the remainder of the Act.

House Resolution 105, authorizing the Kerr subcommittee to investigate the subject matter, did not purport to authorize the subcommittee to impose any penalties of any kind upon respondents. The sole functions of the subcommittee were to investigate, to report, and to recommend any appropriate legislation.

The Congress was not asserting a power of removal from office. It was asserting a power over the emoluments of office. When the House has desired to express itself with respect to "removals" it has never been wanting in language to express that desire. See, for instance, Sec. 2 of the Ramspeck Act (an Act extending the classified executive civil service of the United States), 54 Stat. 1212, (1940) reading in part as follows:

> "That any such incumbent who fails to pass the non-competitive examination provided in his case *shall be separated from the service* not later than six months after the Commission advises the appointing officer that such employee has failed." (Italics supplied)

Also, see Section 9A of the Hatch Act (Act of August 2, 1939, 53 Stat. 1148, 1149), and Section 8 of the original Civil Service Act of 1883 (22 Stat. 406).

Of Hatch Act, sec. 9A, the U. S. Civil Service Commission says in its annual report for 1944:

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[25] "* * * in legislative practice, an additional clause, relating to a matter entirely distinct from that of the bill itself, annexed to a bill while in course of passage." (Webster) cf. *Tolerton* v. *Gordon*, 236 Mo. 142, in the course of which the Court said the proviso there under consideration was not a rider.

> "When a Federal employee is found by the Civil Service Commission to have violated the Hatch Act, the Commission *is required by the law to direct his removal.*"

It may also be worthy of note that the process of Impeachment has never heretofore been thought to apply in cases of minor employees of the Government, either here or in England. Article II, Section 4, of the Constitution, refers to the President, Vice President, and all civil officers. Whether any of respondents are officers in a constitutional sense, and within the term "civil officers," is very doubtful.

During the entire history of our Government the Senate has held only twelve impeachment trials. These involved one President of the United States, one Associate Justice of the Supreme Court, a member of the Cabinet, eight judges of Federal Courts, and one U. S. Senator.

The history of impeachment proceedings in England also bears out the view that it is an appropriate measure only in those cases where the offender is one of high office, whose political influence makes him amenable only to some extraordinary judicial proceeding.[26]

And see Story:

> "The object of prosecutions of this sort in both countries is to reach high and potent offenders, such as might be presumed to escape punishment in the ordinary tribunals, either from their own extraordinary influence, or from the imperfect organization and powers of those tribunals."[27] (p. 513; Sec. 688)

To the same effect see Dwight, "Trial by Impeachment" p. 263:

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[26] For an exhaustive treatise on English and American Impeachment Trials, see Alex. Simpson, "A Treatise on Federal Impeachments," (1916).

[27] Citing, 4 Black. Comm. 260; Rawle on the Constitution, ch. 22, p. 210, 211; 2 Wooddeson's Lect. 40, p. 596, etc.

"It may be asked, why, then, is the cumbrous process of impeachment ever resorted to? The answer is, that there were often found in England persons who could not readily be tried by the common law courts, either owing to an influence which overshadowed the ordinary tribunals, or because technical rules of practice made the usual remedies scarcely worth pursuing."

Since in any event Congress was not undertaking by Sec. 304 to remove respondents, but was content to exercise its undoubted power over the purse, it was under no compulsion to resort to impeachment proceedings, and to have done so in the present instance would have been wholly inappropriate.

(b) *The Condition in Section 304.*

Section 304 provided that no money should be available to pay any one of the respondents after the specified future date

"unless prior to such date such person has been appointed by the President, by and with the advice and consent of the Senate . . ."

Respondents alleged in the lower Court that:

"Section 304 of the Urgent Deficiency Appropriation Act, 1943, is an unconstitutional invasion of the executive power of the President of the United States under Article II of the Constitution of the United States, because the permanent bar to compensation from federal appropriations of any kind after November 15, 1943, except upon fulfillment of conditions imposed by Section 304, is an attempt by the Congress of the United States to effect legislative removal of plaintiff and to deprive him permanently of his status as a federal officer. *The attempt by Section 304 to condition plaintiff's right to continued compensation on reappointment by the President with the approval of the Senate by November 15, 1943, is likewise an unconstitutional encroachment on the executive power of the President of the United*

States to appoint and remove executive officers, and does not in any way remove the taint of unconstitutionality from Section 304. Impeachment is the sole means by which the Congress may lawfully remove an officer of the federal government. (R. 10) (Italics supplied)

The tenor of respondents argument is as follows:

"When we assume, as we must, that the removal of plaintiffs by legislative action is an unconstitutional interference with the executive department, there is no essential difference presented by a provision which makes the removal conditioned upon further action by the President and the Senate."

"Here, however, Congress asserts that it may initiate removals, and make that initiation effective unless the President and the Senate affirmatively step in to prevent it."

The respondents do not contend that it was without the power of Congress to authorize the appointment of the plaintiffs in the prescribed manner. Their argument is that even if that be within the constitutional power of the legislature, its assertion in these cases cannot save Section 304 because the provision was a legislative removal, void whether absolute or conditional.[28]

As we have demonstrated herein, a refusal to pay does not remove from office. The condition in Section 304, therefore, was not a condition precedent, the performance of which was necessary to prevent a legislative *removal*—it was a condition precedent to the use of public moneys with which to pay compensation to the employees. By enacting it Congress did not declare to the executive that unless it should appoint respondents in the manner prescribed the Congress would remove respondents. It merely declared that if he should not appoint them as prescribed no money could be withdrawn from the public Treasury with which

[28] The Attorney General proceeds on the same "removal" theory and does not argue the effects of the condition.

to pay them. No removal resulted from the executive's failure to perform.[29]

While respondents do not argue that the condition infringed upon the executive power to appoint officers, two points might be noted in that connection. First, Section 304 did not compel the President to exercise his power of appointment; and, secondly, the power to appoint and the power to pay are separate powers vested in separate branches of the Government.

Collins v. *United States*, 14 Ct. Cl. 569, involved the validity of a statute authorizing the President

> " . . . to reinstate Major Joseph B. Collins, late of the United States Army, and to retire him in that grade, as of the date he was previously mustered out . . . " (20 Stat. at L., 484, March 3, 1879.)

As stated by the Court, the issues were:

> "First, whether by the terms of the Act Congress intended to confer upon the President alone authority to reinstate the claimant; and, second, whether it had the Constitutional power so to do." 14 Ct. Cl. 570.

The statute was held to be constitutional. In its opinion, the Court referred to a long list of statutes in which the Congress had authorized the President alone to appoint *named* individuals to offices in the Army, and also referred to a number of statutes authorizing the President, by and with the advice and consent of the Senate, to appoint *named* persons to offices in the Army. The Collins case, therefore, sustained the proposition that the Congress may authorize the appointment of specified persons in a designated manner; and by its references the Court recognized that the legislature may authorize the appointment of various individuals to the same office by different methods.

[29] The condition placed in section 304 did not indicate Congressional acceptance of plaintiffs' fitness. Congress made a prima facie finding of unfitness, expressing its willingness to have the matter further examined as provided in the condition.

In Section 304, the Congress went no further than to authorize the President to appoint named persons to office. It did not attempt to order him to appoint them; and his failure to appoint them as prescribed was not attended by any diminution of executive power. The executive power to appoint was in no degree infringed by the fact that failure to appoint as prescribed resulted in a legislative refusal to compensate employees otherwise appointed.

In 7 Op. At. Gen. 215, the Attorney General had before him an act of Congress providing that:

> " . . . the President shall appoint no other than citizens of the United States, who are residents thereof, or abroad in the employment of the government at the time of their appointment . . . "

He ruled that the statute, which purported to control the executive in the matter of appointing diplomatic officers must be deemed merely directory or recommendatory, stating:

> "The limit of the range of selection for the appointment of constitutional officers depends on the Constitution. Congress may refuse to make appropriations to pay a person unless appointed from this or that category, but the President may, in my judgment, employ him, if the public interest requires it . . . "

The Court of Claims also has drawn the distinction between appointment and compensation, pointing out that while the Congress can place no limitation on the Presidential power to appoint diplomatic agents, the power to determine matters relating to their compensation is vested exclusively in the legislature. *Foote* v. *United States*, 23 Ct. Cl. 443; *Byers* v. *United States*, 22 Ct. Cl. 59.[30]

The refusal by the legislature to exercise its exclusive power to provide funds with which to pay plaintiffs unless the President chose to act in the designated manner can-

[30] Also see *infra*, pp. 29-38, distinguishing between compensation and office.

not be construed as an unconstitutional coercion of the executive or an encroachment upon his powers with respect to appointments.

But it also is argued that the purpose of Section 304 was to starve the respondents out of office, and thereby to bring about a removal, and it is claimed that Congress has no authority to so use its power over appropriations and disbursements. This argument requires an examination of the power of Congress over public funds, discussed herein at p. 67.

The Attorney General argued that

> "if Section 304 were construed as permitting plaintiffs to remain in office without pay, it would amount to a partial repeal of the statutory prohibition against accepting voluntary service for the Government (34 Stat. 48, Title 31, U. S. C., sec. 665)," and that Congress did not intend this.

The statute referred to, insofar as pertinent, reads as follows:

> ". . . Nor shall any department or any officer of the Government accept voluntary service for the Government or employ personal service in excess of that authorized by law, except in cases of sudden emergency involving the loss of human life or the destruction of property (23 Stat. 17, May 1, 1884; sec. 3679, R. S.; as amended by 33 Stat. 1257, Mar. 3, 1905, and 34 Stat. 49, Feb. 27, 1906; U. S. C., Title 31, Sec. 665)."

The Attorney General argued in substance, that the court should not construe Section 304 as effecting a "partial repeal" of the statute relating to voluntary services, which is undoubtedly within the power of Congress, but that the court should construe the section as a legislative removal from office or employment, which he contends is not within the power of Congress, and that Section 304, so construed, must be held unconstitutional.

For the purpose of argument, let us assume for a moment that Section 304 were construed as creating excep-

tions to the statute with reference to voluntary services. Would the result be disastrous? Would it be fraught with dangers equal to those which might flow if—for the first time in our history—the courts should invalidate an act of Congress passed in the exercise of the power over the public purse? Obviously not.

We think it clear that "*voluntary service*," as the term is used in 34 Stat. 48, is not synonymous with "*uncompensated service*." This has been the interpretation of the statute since its inception, as recourse to an able and exhaustive opinion of Attorney General Wickersham readily discloses.[31]

To sustain their contention that compensation and office are indivisible and that refusal to provide compensation is legislative removal, the principal authority cited by the respondents in the Court below was *State ex rel Tolerton v. Gordon*, 236 Mo. 142. In addition thereto, the Attorney General emphasized two other state court decisions: *Reid v. Smoulter*, 128 Pa. State 324, and *Cotten v. Ellis*, 52 N. C. 545.

While none of those cases is analogous on the facts to the present claim, insofar as they declare the doctrine that refusal to provide compensation is removal they are contrary to Federal rulings on the subject. *United States v. Mitchell*, 109 U. S. 146, 150.

In only two instances does the Constitution provide that officers of the Government shall be compensated for services rendered the United States.[32] With regard to the Executive, it provides that

> "The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be in-

[31] 30 Op. At. Gen. 51.

[32] The Constitution also provides "The Senators and Representatives shall receive a Compensation for their Services to be ascertained by law, and paid out of the Treasury of the United States." (Art. I, Sec. 6)

creased nor diminished during the Period for which he shall have been elected . . ."[33]

With regard to the judiciary, it provides that

> "The Judges, both of the supreme and inferior Courts . . . shall at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."[34]

It is not without significance that the Constitution includes specific mention of Ambassadors, Ministers, Consuls, Heads of Departments, and the Vice President, but *nowhere* suggests that they shall "receive, for their Services, a Compensation." In the instance of these latter constitutional officers, the matter of compensation, if any, is left to the discretion and judgment of the Congress. Surely it cannot be said that the compensation of *statutory* officers and mere employees is any less within the exclusive dominion and control of the Congress or is *required* by the fundamental law of our Government.

Thus, the Chief Executive and the judges were themselves made independent of the Congress in matters of compensation while the great branches of Government over which they preside were purposely made dependent in this respect. None of the three great branches of government was meant to be completely independent of the others.

But the President's constitutional power and prerogative of appointment is not dependent upon his appointees' being compensated. The President retains the power to appoint certain officers, even though they will receive little or no compensation for services rendered. Unquestionably the President's ability and right to appoint is independent of the power of Congress to authorize and determine the amount of compensation, even though Congress sometimes

> " * * * embarrasses the exercise of that right by subjecting the appointee to conditions which are somewhat onerous." (16 Op. At. Gen. 522)

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[33] Constitution of the United States, Art. II, Sec. 1, Cl. 7.

[34] Idem, Art. III, Sec. 1.

In passing, it may be noted that if the Attorney General's position in the Court below were correct and, respondents were not permitted under 34 Stat. 48, to work without compensation, the arrangement by which respondents were required, or suffered, or permitted to work after November 15, 1943, (to paraphrase the Fair Labor Standards Act) when no appropriation was available with which to pay them would be a violation of law by their executive superiors and require *their* summary removal from office.

The prohibition against voluntary services appeared in Section 3 of the Act of February 27, 1906, 34 Stat. 48, 49. This superseded a similar provision contained in the Act of May 1, 1884, c. 37, 23, Stat. 17[35] and amended the Act of July 12, 1870, c. 250, Sec. 7, 16 Stat, 251 by adding the limitation *supra* to others designed to prevent expenditures in excess of appropriations and to necessitate the apportionment of appropriations for contingent expenses over the period for which such funds are made available.[36]

All the provisions of 34 Stat. 48, including that quoted above, are mandatory; and to this end the statute also provides that

> ". . . Any person violating any provision of this section shall be summarily removed from office and may also be punished by a fine of not less than $100 or by imprisonment for not less than one month."

This statute has been construed many times, and the authorities have concluded uniformly that it was not meant

[35] The text of the act is as follows: "To enable the Secretary of the Interior to pay the employees temporarily employed and rendering service in the Indian Office from January first up to July first, eighteen hundred and eighty-four, two thousand one hundred dollars, and hereafter no Department or officer of the United States shall accept voluntary service for the Government or employ personnel in excess of that authorized by law except in cases of sudden emergency involving the loss of human life or the destruction of property."

[36] Where appropriations are inadequate or non-existent, statutes forbid purchase contracts (34 Stat. 255), construction contracts (R. S. 3733), and rental agreements (19 Stat. 370).

to prohibit services rendered in an official capacity under regular appointment to an office otherwise permitted by law to be non-salaried. Attorney General George W. Wickersham, in an opinion to the Secretary of the Interior, February 7, 1913, had occasion to examine the statute and its legislative history. (30 Op. At. Gen. 51) His opinion, which has never been overruled or modified, is, in pertinent part, as follows:

> "It seems plain that the words 'voluntary service' were not intended to be synonymous with "gratuitous service' and were not intended to cover services rendered in an official capacity under regular appointment to an office otherwise permitted by law to be non-salaried. In their ordinary and normal meaning these words refer to service intruded by a private person as a 'volunteer' and not rendered pursuant to any prior contract or obligation, and they were exactly so construed (though not as a part of this statute) in Board of Commissioners v. Richardson (54 Ind. 153, 156). An incidental *dictum* of Mr. Justice Field in his separate concurring opinion in United States v. San Jacinto Tin Co. (125 U. S. 273, 305) may in some of its language be construed to indicate a view that Congress intended 'voluntary service' to be synonymous with 'gratuitous service,' but his language was explicitly addressed to 'the practice of obtaining services from *private parties* without incurring liabilities for them' It would be stretching the language a good deal to extend it so far as to prohibit *official* services without compensation in those instances in which Congress has not required even a minimum salary for the office.
>
> "Taking the section as a whole, it is also perfectly evident from its legislative history that *the purpose was to prevent the Departments from incurring financial obligations over and above those authorized in advance by Congress.* In its original form it did not contain the words I have italicized in the text as quoted above, but merely prohibited—
>
> "*Thus it is evident that the evil at which Congress was aiming was not appointment or employment for*

authorized services without compensation, but the acceptance of unauthorized services not intended or agreed to be gratuitous and therefore likely to afford a basis for a future claim upon Congress. The latter class of case has been held to be within the act. (Lee v. United States, 45 Ct. Cl. 57).

"Having regard, therefore, to the particular language used and to the purpose as disclosed also by the legislative history, I am of opinion that Revised Statutes, section 3679, does not prohibit the appointment of a person to an official position, *even though it be a condition of the appointment that the service is to be without compensation.*

"Of course, I do not mean by anything I have said herein to intimate that persons may be appointed without compensation to any position to which Congress has by law attached compensation. (Glavey v. United States, 182 U. S. 595; Miller v. United States, 103 Fed. 413). *The position of superintendent of Indian schools, however, is one of those appropriated for in general lumpsums* (37 Stat. 518 passim; 35 Stat. 73; 34 Stat. 1020) *and to which, therefore, persons may be appointed either without compensation or with any compensation short of the maximum.*" (Italics supplied)

The foregoing opinion of Attorney General Wickersham is sufficient authority for the proposition that plaintiffs could have remained in office without compensation, and, further, that the *appointing power* is not dependent upon provision for the compensation of the person appointed, although the power to appoint may not be used as a device to pledge the assets of the United States or to create a debt binding upon the government when Congress has decided otherwise. There is much additional authority, all of which is in harmony with the opinion above.

Thus, in 1925, Attorney General John G. Sargent stated in an opinion.[37]

"I am not unmindful of the statutory provisions which prohibit the employment of officers, clerks, or other employees in the executive departments or bureaus

[37] 34 Op. At. Gen. 490, 496.

> when such employment has not been authorized and appropriation made therefor. Their purpose, however, is to prevent the unauthorized employment of persons who, after rendering services, will make claims for compensation. * * * I have the honor, therefore, to advise you that, in my opinion, the Chief of the Bureau of Efficiency may be appointed a member of the Board of Actuaries provided for by section 16 of the Retirement Act, approved May 22, 1920, supra, to serve on said board without compensation in addition to that provided by law for the position now held by him, and such appointment, if made, will not be in violation of any statute."

Needless to say, the person thus appointed would be nonetheless an officer because uncompensated; nor would his acts be any the less binding or official because unrequited.

In another recent decision[38] the Comptroller General once more considered 34 Stat. 48, prohibiting voluntary services, and stated in his opinion:

> "There has been considerable misunderstanding regarding the proper application of that statutory provision—the practice having been adopted, it seems, of authorizing the payment of salary at the rate of $1 per anum in order to prevent a violation of said statute. Such a practice is unnecessary unless some other statute or appropriation act *requires* the payment of $1 per annum." (Italics in the original)

The relationship between appropriation laws of Congress and the President's power of appointment has been the occasion of serious investigation and careful opinion. Thus, in 1843, Attorney General John Nelson stated:[39]

> "The power of appointment results from the obligation of the executive department of the government 'to take care that the laws be faithfully executed;' an obligation imposed by the Constitution, and from the authority of which no mere act of legislation can operate a dispensation. Congress may, however, indirectly

[38] 23 Comp. Gen. 900, 903.

[39] 4 Op. At. Gen. 248.

limit the exercise of this power by *refusing appropriations to sustain it*, and thus paralyze a function which it is not competent to destroy. This would seem to be the purpose of the act of the 26th August, 1842, which may be regarded as an exposition of the legislative will, and to which, except in cases of commanding exigency, I think the executive action should be conformed; for, whilst it is quite clear that *the power of appointment is unimpaired* by the acts of Congress referred to, it is equally obvious that the intention of those by whom they were passed was to discountenance its ordinary execution.

"The terms of the Act of August, 1842, are free from all ambiguity. They unqualifiedly prohibit any payments to agents or commissioners, thereafter to be appointed, except out of specific appropriations to be made by law. In all cases, however, even in those of the most pressing urgency, in which the executive departments of the government might feel that the best interests of the country called for the exercise of the appointing power, *a resort to Congress for the means of compensating the appointees would be indispensable*. The authority to requite the services of officers so appointed cannot be safely implied from the general terms of an appropriation law, *which should always be interpreted in subordination to the limitations imposed by existing and qualifying enactments*." (Italics supplied)

In this connection, another statute is worthy of particular note. It provided as follows:

> "No money shall be paid from the Treasury as salary to any person appointed during the recess of the Senate, to fill a vacancy in any existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until such appointee has been confirmed by the Senate.[40]

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[40] R. S. Sec. 1761; Feb. 9, 1863, c. 25, sec. 2, 12 Stat. 646. This was amended by the Act of July 11, 1940, c. 580, 54 Stat. 751; 5 U. S. C. A. 56, and now requires that nomination of certain of such recess appointees must be submitted to the Senate not later than forty days after the commencement of the next succeeding session of the Senate.

The statute has been construed by several Attorneys General over a period of years. All have recognized the effectiveness of the withholding feature but none has even suggested it might be an encroachment on the executive prerogative or that it would in any way cause an appointment otherwise valid to be null and void.

Thus, in 1880, Attorney General Devens advised the President [41] that

> "This legislation, (R. S. sec. 1761) in assuming to act upon the salary of officers appointed during the recess of the Senate when the vacancies actually existed while the Senate was in session, must be deemed a recognition by Congress of the invariable construction given by the Presidents to the power of appointment conferred upon them by the Constitution. In postponing the payment of the salary of the appointee until the Senate has given its assent to the appointment, it concedes the right of the President to appoint, although it undoubtedly embarrasses the exercise of that right by subjecting the appointee to conditions which are somewhat onerous."

Subsequently, the Chief Executive was counseled by Attorney General Brewster [42] that

> "The office of United States attorney for the northern district of Georgia, which has become vacant during the present session of the Senate, may be filled during the next ensuing recess of the Senate by a *temporary appointment* by the President."
>
> * * * * * * *
>
> "It is, however, to be observed in this connection that payment of the salary of the appointee, in such case, is by section 1761, Revised Statutes, postponed until he has been confirmed by the Senate."

Much later the effect of this statute was again reviewed and the then Attorney General advised the President [43]

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[41] 16 Op. At. Gen. 522, 531.

[42] 17 Op. At. Gen. 521 (1883).

[43] 32 Op. At. Gen. 271 (1920).

that where vacancies on the Interstate Commerce Commission and the United States Tariff Commission which existed while the Senate was in session were filled after adjournment of the Senate by the issuance of recess commissions, the appointees could not be paid their respective salaries under such recess appointments.

From the Constitution itself, and, especially, in the light of the consistent interpretations of the administrative officials charged with advising and counseling the President, it may be concluded that the President's power of appointment is in no manner impaired by withholding the compensation of his recess appointees and requiring their nomination to the Senate within a fixed time after the commencement of the next succeeding session of the Senate. The act required is a lawful one, and it may be made a condition precedent to the payment of compensation.

Office and compensation are, therefore, separate and distinct things. The latter is not an indispensable incident to the former. The control over compensation is lodged exclusively in the Congress (cf. Embry v. United States, 100 U. S. 680). Since Congress under the Constitution may decline to appropriate money for any purpose which it considers not to be for the general welfare, it is immaterial that the executive powers over appointments and removals may be incidentally affected. So long as the Executive is under no compulsion to exercise his powers, it cannot be successfully maintained that his prerogatives are invaded.

Section 304 was Clearly a Valid Exercise of Congressional Authority Over Public Funds.

The following pertinent constitutional provisions are involved:

> 1. "The Congress shall have Power to lay and collect taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defence and general Welfare of the United States . . ." (Art. I, Sec. 8, Cl. 1)

2. "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . ." (Art. I, Sec. 9, Cl. 7)

3. "The Congress shall have power . . . to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." (Art. I, Sec. 8, Cl. 18)

The first and paramount power confided to the Congress by the Constitution is the power to appropriate public funds "to pay the debts and provide for the . . . general welfare of the United States."[44] The first clause governing the consideration of bills in Congress provides that all money bills must originate in the House.[45]

It was not by mere accident that the framers of the Constitution gave the power of the purse a place of preeminence in the Constitution. As eloquently stated by Mansfield in "The Comptroller General,"

> "The roots of legislative supremacy in finance reach deep into the heritage of English political institutions . . . Parliament stood in the popular role of protector of the pocketbooks of the nation. The incidents in the story, from the financial embarrassments of James I to the Revolution of 1688, were familiar to all who shared the political traditions of England. They spelled out one principal lesson: legislative control of the purse is the best practical guarantee of the maintenance of representative government * * * It was from the depths of political conviction, therefore, that the framers of the Constitution vested in Congress the taxing and spending powers, and added the provision that 'No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.' There the powers remain . . ." (pp. 6, 7)

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[44] Art. I, Sec. 8.

[45] Art. I, Sec. 9, Cl. 7.

Respondents and the Attorney General have joined in urging that the present exercise of control over public funds be stricken down because if the power of Congress to withhold appropriations on the conditions laid down in Section 304 be sustained the power may be abused.

But to all such arguments the simple answer is that the possibility of abuse is never a ground for setting aside an act when the power of enactment is clear. The argument is one of policy rather than power. As early as 1798, Mr. Justice Iredell said that:

> "It is not sufficient to urge that the power may be abused, for such is the nature of all power—such is the tendency of every human institution." (*Calder* v. *Bull*, 3 Dall. 400)

Respondents argued in the Court of Claims:

> "But the examples of what might be done under a power of Congress to appropriate free from all restraint are limited only by one's imagination. No money shall be used to pay Secretary Morgenthau, or Justice Murphy, or Senator Barkley, or any person who voted for Dewey, or any Catholic. No money shall be paid to any Supreme Court Justice unless the decision in *Smith* v. *Jones* is rendered in favor of Smith. No money shall be paid the State Department until Argentina is extended full recognition, or Russian recognition is withdrawn. That is not to say that such measures are likely. We agree, with Mr. Justice Stone, that 'Courts are not the only agency of government that must be assumed to have a capacity to govern.' *United States* v. *Butler*, *supra*, at p. 87."

It is well settled that the:

> ". . . possible abuse of a power is not an argument against its existence." *Hamilton* v. *Kentucky Distilleries & W. Co.*, 251 U. S. 146, 161.

Every argument advanced by respondents and by the Attorney General against the powers here under consideration

was advanced against every great power confided by the Constitution to either of the departments of Government, by those who urged rejection of the Constitution; but every such argument was answered in "The Federalist" and disposed of by the people of the United States when they adopted the Constitution. In the present case, the record is clear that there was no abuse of power.

The precise question presented here has never before been adjudicated in our courts. It may well be supposed that the existence of the power of Congress in its absolute discretion to withhold funds is so clear that heretofore no one has thought to challenge the exercise of the power. As Mr. Chief Justice Chase said in *Mississippi* v. *Johnson*:

> "It was admitted on the argument that the application now made to us is without a precedent; *and this is of much weight against it.* . . . The fact that no such application was ever before made in any case indicates the general judgment of the profession that no such application should be entertained." (4 Wall., 500)

As stated by Wilmerding in "The Spending Power":

> "From the founding of our government down to the present time everyone has understood and accepted the proposition that the right of granting supplies of money to the Executive and of appropriating them to the several branches of the public service belongs exclusively to Congress. *This is one of those maxims of state that have ceased to be subjects for discussion and have become articles of faith.*" (Preface, p. iii)

As the Court of Claims said in the Hart Case:

> "The absolute control of the moneys of the United States is in Congress, and Congress is responsible for its exercise of this great power only to the people." *Hart* v. *U. S.*, 16 Ct. Cl., 484; see *Collins* v. *U. S.*, 14 Ct. Cl. 568.

The framers of the Constitution were not content to grant to Congress the power to tax and to spend. They

went a step further and provided that except in pursuance of an appropriation by Congress no money could be drawn from the Treasury. This provision—operating on all persons and all agencies, executive and judicial alike—clearly vests in Congress complete discretion as to whether it will authorize money to be withdrawn from the Treasury for any particular purpose; and its decision not to authorize the withdrawal is conclusive upon all. Such a refusal creates no private rights—certainly no private rights cognizable by the judiciary.

The question presented by a Congressional refusal to appropriate is political in nature. Though presented here in a new form, it is no different in character than that considered by our forefathers and decided in England *as a political question* more than a century before the American revolution.

The importance of the present case is attested by the fact that *never in the history of the United States have the courts invalidated an act of Congress directing the withholding of public funds, either absolutely or conditionally.* The implications of a decision against the Government in this case are obvious, for Congress has, since the beginning of our Government, exercised the right to withhold funds, in its complete discretion. The statutes are replete with permanent limitations on the expenditure of public funds, and the authority of executive officers to commit the Government to incur obligations to pay out public funds. In addition, many such temporary limitations appear from year to year in the annual appropriation acts for the various departments, agencies, and instrumentalities of Government.

We are dealing here with exceptions to lump sum appropriations. "When the Federal Government occupied its permanent seat in Washington, it brought a hundred and thirty-odd employees and a few boxes of records."[46]

[46] James M. Beck and Merle Thorpe, "Neither Purse Nor Sword," p. 166.

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There is no question that at the outset Congress could have made specific appropriations for every purpose *and for every person* in the employ of the executive branch. In so appropriating, it could unquestionably refuse or fail to appropriate for particular employees by *merely leaving their names off the list of those appropriated for.* It has continued to this day to make appropriations to pay the salaries of occupants of designated positions in instances where that course is regarded as necessary or desirable.

But the growth of the executive branch of the Government to a point where it now has nearly three and one-half million employees made specific appropriations for personal services impracticable. As a matter of convenience, Congress resorts to lump sum appropriations, conditioning them by exceptions, limitations, and restrictions of various kinds.

To hold that Congress may not make such exceptions to a lump sum appropriation as it sees fit, under conditions which now prevail, would produce the very practical difficulties which the lump sum method was designed to overcome. The only alternatives open to Congress would then be to resort to specific appropriations for individuals by name or to relinquish to the executive branch of the Government a part of its constitutional power over appropriations.

(a) *General Nature and Extent of the Power.*

A discussion of the power of the purse requires a brief reference to its history, the manner in which the power originated in the Constitutional Convention, and the peculiar position of the House with respect thereto. The fundamental issue here involved antedates the formation of the United States Government itself, yet today the plenary legislative power to control the expenditure of the taxpayers' money is being challenged. The very definition of an appropriation,—"the act of setting apart or assigning to a particular use or person in exclusion of all others"

—sustains the power of Congress to enact the provision challenged in these suits.

As the Colonists were settling in America, the House of Commons was maintaining its right to withhold public funds. The Petition of Right (1628) was a demand by Commons that Charles I assent to the conditions thereof "previous to any grant of supplies."[47]

When Parliament demanded of King Charles I "an account of the expenditure" in connection with the Dutch War, "Charles at first resisted the proposal as a *breach on his prerogatives;* but in the finish, with his usual subtle adroitness, he gave way."[48]

Later (1689) the power of Parliament to levy "money for or to the use of the Crown" was asserted in the Bill of Rights accepted by William and Mary. This Bill of Rights provided that money could not be used by the Crown "for other time and in other manner than the same is or shall be granted."[49]

In his "History of the Committee on Appropriations"[50] the late Chairman Taylor[51] says that the framers of the Constitution:

> "had the benefit of intimate knowledge of the history of the evolution of parliamentary democracy under the British Constitution and it is generally recognized that they were guided by the centuries of experience of the English race in the mother country in evolving the processes of free government. Among these, and of transcendent importance, was the question of levying taxes and of appropriating the funds 'for carrying on his Majesty's Government' or for the executive branch. As a result of a long and determined struggle, this prerogative was finally lodged exclusively in the House

[47] Formation of The Union Under the Const., p. 519.

[48] Encyclopædia Americana,' Vol. 13, p. 188.

[49] Formation of the Union Under the Constitution, p. 526.

[50] H. Doc. 299, 77th Cong., 1st Sess.

[51] Chairman, House Committee on Appropriations, served in Congress twenty years.

of Commons, that arm of the Parliament closer to the people and more responsive to the public will."

Taylor's authoritative treatise continued:

"The Committee on Appropriations of the House is the instrumentality . . . through which the House exercises its *exclusive prerogative* to originate general appropriation bills. This exclusive function was conferred upon the House by the people themselves in a specific provision in the original Constitution, which has remained unaltered to this day . . ."[52]

"Unfailingly, throughout over a century and a half of the existence of the Government, the House has asserted and successfully maintained its exclusive right in this matter . . . the very keystone of the arch of the compromise upon which the Constitution rests, and without which it is not certain the Union of the States would ever have been achieved, is the provision under which it has been held from the beginning that appropriation bills, as well as tax bills, must originate in that House of the Congress closer to the people . . ."[53]

"One of the most ancient and valued rights of the Commons is that of voting money and granting taxes to the Crown for the public service . . . They upheld it with a bold spirit against the most arbitrary of kings, and the Bill of Rights crowned their final triumph over prerogative." (May's Const'l History of England, Vol. 1, p. 374)

"It is the glorious tradition of the land from which we get our laws that the House of Commons shall protect with every safeguard the money of the people. It is an inheritance which this House of Representatives has maintained during the existence of our Government with singular fidelity." (Cong. Rec., 58th Cong., 2d Sess.; Rep. Olmstead—manager of impeachment proceedings against Judge Charles Swayne)

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[52] "All bills for raising revenue shall originate in the House of Reps.," Art. I, Sec. 7; "Bills for raising revenue" include "bills to appropriate revenue." See Rule XI, 3, House Rules & Manual and Taylor's History, p. 4.

[53] Taylor's "History of the Committee on Appropriations," p. 4

In 1625 the House of Commons postponed the supplies demanded by Charles I for carrying on the war with Spain.[54] Fifty years later, Commons withheld funds from Charles II.[55] In 1677 they refused him an additional revenue.[56] In 1685 Commons granted only one-half the revenue requested by James II.[57]

The power of the House of Commons to withhold public funds was exercised in more modern times. The salary of the traveling agent of the National Gallery was refused in 1858.[58]

Although it has seldom been necessary,

> "it is within the power of the House of Commons in Committee of Supply, to reduce any such vote by omitting the amount of any *particular salary* . . ."[59]

(b) *If Congress Has Plenary Power to Appropriate, It Follows, of Course, That Congress May Refuse to Appropriate.*[60]

Alexander Hamilton had no doubts on this subject.

> "The House of Representatives cannot only *refuse*, but they alone can propose, the supplies requisite for the support of the Government. They, in a word, hold the purse, that powerful instrument by which we behold, in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activity and importance and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the Government. This power over the purse may in fact be regarded as the most complete and effectual

[54] Parl. Hist., ii, p. 35, cited by May, p. 375.
[55] Idem, iv, p. 757, cited by May, p. 375.
[56] Idem, p. 1000, cited by May, p. 375.
[57] Idem, p. 1379, cited by May, p. 375.
[58] Footnote, May's Cont. Hist. of Eng., Vol. 1, p. 375.
[59] Parl. Gov't. in Eng., Vol. I, p. 395.
[60] Subject only to the provisions of the Constitution respecting salaries of the President, judges, and members of Congress.

> weapon with which any constitution can arm the immediate representatives of the people *for obtaining a redress of every grievance* and for carrying into effect every just and salutary measure." "Federalist," No. 58. (Italics supplied)

The complete and exclusive legislative control of public expenditures has been sustained when in conflict with a treaty,—"the Supreme Law of the Land."[61] Perhaps the most jealously guarded executive prerogative is the power to make treaties;[62] nevertheless, all authorities agree that this power may not be effectively exercised in conflict with the legislative power to withhold appropriations.

In his "Discourse on the Constitution," Calhoun says that the Constitution:

> "gives to Congress as the law making power, and to the House of Representatives as a portion of Congress, the right to withhold appropriations and thereby, an important control over the treaty making power wherever money is required to carry a treaty into effect; which is usually the case . . ." (Willoughby, Vol. 1, p. 562).

Justice McLean, in his work, "Constitutional Law" (p. 347), says:

> "a treaty is the supreme law of the land in respect to such matters only as the treaty making power, without the aid of Congress, can carry into effect. Where a treaty stipulates for the payment of money for which an appropriation is required, it is not operative in the sense of the Constitution . . . so far as the treaty stipulates to pay money the legislative sanction is required."

When the treaty for the purchase of Louisiana was negotiated, President Jefferson sent the document to the House of Representatives for an appropriation. In his message

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[61] Art. II, Sec. 2.

[62] By and with the advice and consent of the Senate.

to the House, Jefferson advised that he was submitting the treaty for the exercise of legislative functions:

> "as to those conditions which are within the powers vested by the Constitution in Congress."[63]

When the purchase of Alaska was negotiated, in 1867, Congress again asserted its power to withhold appropriations for the execution of treaties. At the insistence of the House, the appropriation involved in the treaty was prefaced with the statement that the treaty could not be carried into effect except by "consent of *both* Houses of Congress."[64]

While Article II, Section 2, gives the President the power to pardon, it does not supervene the plenary legislative control of the purse:

> "Monies once in the Treasury can only be withdrawn by an appropriation made by law. However large, therefore, may be the power of pardon possessed by the President, and however extended may be its application, there is this limit to it, *as there is to all his powers*, it cannot touch monies in the Treasury of the United States except expressly authorized by Act of Congress. The Constitution places this restriction upon the pardoning power."[65]

The pardoning power does not restore a right to recover money the payment of which is forbidden by an act of Congress, or to recover property forfeited into the Treasury.[66]

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[63] Moore, Digest of International Law, V. 759.

[64] Willoughby on the Const., Vol. 1, 2d Ed., p. 551.

[65] *Knote* v. *U. S.*, 95 U. S. 149, 24 Law. Ed. 442. See *Austin* v. *U. S.*, 155 U. S. 417, 424.

[66] *Hart* v. *U. S.*, 118 U. S. 62, 30 Law. Ed. 96.

(c) *The Power to Appropriate "For The General Welfare" Embraces The Power to Place Limitations And Conditions On Appropriation Bills.*

The majority opinion in *U. S.* v. *Butler*, 297 U. S. 86, concurs with Hamilton and Story on the proposition that the substantive legislative power to appropriate:

> "is limited only by the requirement that it shall be exercised to provide for the general welfare of the United States . . . the power of Congress to authorize expenditure of public monies for public purposes is not limited by the direct grants of legislative power found in the Constitution." (pp. 65, 66)

The majority in the Butler case pointed out that they were:

> "not concerned here with a provision that if certain conditions are not complied with the appropriation shall no longer be available . . . There is an obvious difference . . ." 297 U. S., pp. 80, 81.

The plenary legislative power over appropriations was reaffirmed in *Helvering* v. *Davis*, 301 U. S. 619, in which Mr. Justice Cardozo said that "It is now settled" that "Congress may spend money in aid of the 'general welfare.'" And as to what constitutes "general welfare," the court reaffirmed the rule that the discretion to decide "*is not confided to the courts. The discretion belongs to Congress* unless the choice is clearly wrong . . . This is now familiar law."[67] (p. 640)

The Constitution authorizes Congress to appropriate public funds for one purpose only—to promote the general

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[67] "When money is spent for the general welfare, the concept of welfare or the opposite is shaped by Congress . . . " *U. S.* v. *Butler*, 297 U. S., p. 645. (See *Cincinnati Soap Co.* v. *U. S.*, 301 U. S. 308, P. 313.)

". . . Whether the present expenditure serves a public purpose is a practical question addressed to the lawmaking department." *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, P. 515.

welfare. If Congress concluded, as it did here, that the expenditure of public funds for the payment of plaintiffs' salaries would not be for the general welfare, it had no alternative under the Constitution—it was *required* to provide such conditions and limitations as would satisfy the legislature that its appropriations would be used for the general welfare; otherwise, appropriations would lose their constitutional sanction. We submit that Solicitor General James M. Beck was correct when he said that the Myers[68] opinion was in no way inconsistent with the doctrine that:

> "... the Congress, in appropriating public money has the right to see that the money is used for the purposes for which appropriated." (Our Wonderland of Bureaucracy, p. 61)

Having determined *prima facie* that the expenditure of public funds with which to pay respondents' salaries would not be in the National interest, it was incumbent upon the House to withhold funds for that purpose. However, Section 304, as modified, was not even an absolute refusal to appropriate to pay plaintiffs' salaries—it would have been inoperative as a withholding proviso if the executive department had elected to nominate plaintiffs and the Senate had found, in effect, that it would have been in the National interest to spend public funds for their salaries.

The various state courts have considered the nature of an appropriation and uniformly support the doctrine that an appropriation does not remove funds from the Treasury. *Ristine* v. *State*, 20 Ind. 328, 331; *State* v. *Kenney*, 9 Mont. 389; *State* v. *Moore*, 50 Neb. 88; *Stratton* v. *Green*, 45 Calif. 149, 151; *State* v. *Derham*, 61 S. C. 258, 263; *Brown* v. *Honiss*, 74 N. J. L. 501, 521.

In *Brown* v. *Honiss*, the New Jersey Court pointed out:

> "The appropriation of public money and its disbursement are two different and separate acts. Webster's definition of 'appropriation' so far as here pertinent,

[68] *Myers* v. *United States*, 272 U. S. 52.

> is: 'The act of setting apart or assigning to a particular use or person in exclusion of all others; application to a special use or purpose, as of money, to carry out some object' . . . In our systems of government, federal and state, the appropriation and payment of public moneys are always kept distinct, and appropriations are often coupled with some condition whose performance is to come after the appropriation but before the actual payment."

It being established that funds remain in the Treasury following an appropriation, *it follows that they remain subject to the control of the Congress;* and a refusal to permit appropriated funds to be used for a particular object may not be questioned in the courts. The executive branch has no vested right to appropriated funds.

In *Cincinnati Soap Co.* v. *United States*,[69] the present respondents' counsel successfully urged that the power to appropriate is a plenary legislative power. Mr. Justice Sutherland, speaking for a unanimous court, said that the extent to which Congress will appropriate money in aid of moral obligations "is a question for the determination of the political departments of the Government" (p. 319) and that such questions are "not for judicial but for Congressional consideration and determination." (p. 320)

> "That Congress has wide discretion in the matter of prescribing *details* of expenditures for which it appropriates must, of course, be plain. Appropriations and other acts of Congress are replete with instances of general appropriations of large amounts to be allotted and expended *as directed* . . ." (pp. 321, 322)
> "Queries directly or indirectly challenging the wisdom or necessity of the Congressional action, are all matters, as we repeatedly have pointed out, with which the courts have nothing to do." (p. 324)
> "It is for Congress, proceeding under the Constitution, to say what amount may be drawn from the Treasury in pursuance of an appropriation."[70]

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[69] 301 U. S. 308.

[70] *Hooe* v. *U. S.*, 218 U. S. 333.

While, as a general rule, Congress may not restrict one's liberty of contract under the Fifth Amendment, acts withholding appropriations, in apparent conflict therewith, must be upheld. In *Capital Trust Co.* v. *Calhoun*, 250 U. S. 208, the Supreme Court held that notwithstanding a prior contract between attorney and claimant for a fee of fifty per cent of the sum appropriated for the claimant, and notwithstanding that services had already been rendered when the statute was passed, Congress might condition the appropriation so as to limit the attorneys' fees to twenty per cent of the recovery. Despite the prior contract protected by the Fifth Amendment, the Court held that:

> "'. . . Calhoun's claim for a balance due as fees cannot be paid out of the moneys appropriated by Congress . . . or recognized as having any validity as against that fund." (p. 220)

and that:

> "Whatever might have been the moving considerations, the power (to withhold appropriations) exercised must be sustained." (p. 219)[71]

Sec. 12 of the Hatch Act in pertinent part provides that no officer or employee of a state or local agency employed principally in connection with an activity financed by Federal loans or grants shall indulge in certain political activities. Charges of violation are investigated by the Civil Service Commission, which, after a hearing, if it so finds, may notify the state or local agency of its determination that the offending employee should be removed. Section 12 then provides:

> *If in any case the Commission finds that such officer or employee has not been removed from his office or employment within thirty days after notice of a determination by the Commission that such violation warrants his removal; or that he has been so removed and has subsequently (within a period of eighteen*

[71] See also *Calhoun* v. *Massie*, 253 U. S. 170.

months) been appointed to any office or employment in any State or local agency in such State, the Commission shall make and certify to the appropriate Federal agency an order requiring it to withhold from its loans or grants to the State or local agency to which such notification was given an amount equal to two years' compensation at the rate such officer or employee was receiving at the time of such violation; * * (18 U. S. C. 61 l (b)).

These provisions have been challenged in two cases: *Stewart* v. *United States Civil Service Commission,* District Ct., Southern District Georgia, June 29, 1942, 45 F. S. 697; and *Neustein v. Mitchell,* District Court, Southern District New York, Nov. 22, 1943, 52 F. S. 531. In each case the Civil Service Commission had proceeded to find an employee of a state agency financed in part by Federal funds guilty of political activities proscribed by Paragraph (a). Proceedings were brought under Paragraph (c) of 18 U. S. C. Sec. 61 l to review the determination thereunder of the Civil Service Commission.

In each case the contention was advanced that these provisions were unconstitutional in that they infringed upon state rights guarateed by the Tenth Amendment. In each case the court held that the provision was constitutional. In the Neustein case, the court stated:

> "The constitutional question requires little consideration. Congress had power to attach proper conditions to loans and grants of Federal funds . . . this clearly was a proper condition to the loans or grants to the State . . ." (p. 532)

It then went on to state that the condition clearly was a proper one not open to the charge that it coerced the state, and that under the Hatch Act the state is under no compulsion to discharge an employee found guilty of violating Paragraph (a) but may retain him subject to withholding by the Federal Government from its grants of an amount equal to his compensation for two years.

In the Stewart case the court remarked (p. 700):

> "The proceeding was under Sec. 12 of the Act, which was enacted by Congress to safeguard and supervise expenditures of appropriations made by it. It does not provide for any judgment against the plaintiff or the state or compel them to do anything they are unwilling to do, but merely authorizes the withholding of Federal funds unless its protective provisions are complied with. This is a legitimate condition to the granting of Federal funds and in no way infringes upon any right of plaintiff or the state." (In the Stewart case the State of Georgia intervened)

In the Stewart case the plaintiff had also contended that the proceedings of the Civil Service Commission were inadequate because the proceeding was essentially a criminal proceeding and the necessary safeguards to the accused had not been met. The court dismissed this contention.

It is interesting to note that under Sec. 61 l (b) the plain intent seems to be to have the offending employee removed, since the withholding of the funds only occurs if he has not been removed. Furthermore, the withholding of funds directly attaches to the employment of the offending employee, since under the statute if he is transferred to another agency financed by Federal funds, the withholding then applies to such agency.

We submit that the power to appropriate *ex necessitate rei* includes the power to withhold appropriations and that:

> "It is for Congress, proceeding under the Constitution, to say what amount may be drawn from the Treasury in pursuance of an appropriation."[72]

[72] *Hooe* v. *U. S.*, 218 U. S. 333.

(d) *Respondents' Position Is Not Supported By Legislative Precedents.*

Respondents asserted in the court below that legislative precedents condemn Section 304 and cited certain so-called legislative precedents[73] which are here considered.

In examining these precedents it should be borne in mind that

> ". . . it is impossible to determine with certainty what construction was put upon an act by the members of the legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other . . ." *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 318.

Respondents cited the case of Major Charles C. Cresson and quoted the views of two individual members of Congress to support the proposition that Congress was without the power to enact Section 304. The views of those two members were not adopted by the House. On the contrary, a decision was rendered on the same day holding a similar proviso in order. This legislative precedent will be discussed more fully in connection with the case of Col. Hunt, *infra*. In the Major Cresson case, the action of the House in declining to withhold funds for Major Cresson's salary cannot be said merely to reflect the views of two individual members, or to have proceeded on other than policy grounds.

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[73] A legislative precedent is established by ruling and decision of the Speaker or Chairman, which any individual member may appeal to the House itself and which is binding until reversed, or, of course, in the absence of a ruling, by a vote of the House. See Rules and Manual, House of Representatives, Rule 1, Sec. 4, p. 286. Decisions of the Speakers and Chairmen of the Committee of the Whole House "are to the rules of the House what the decisions of the courts are to the statutes." See Rules and Manual, House of Representatives, p. (vi).

In the case of Col. Hunt respondents argued below that the failure of Congress to withhold Col. Hunt's salary indicates a legislative decision that Congress is *without the constitutional power* to enact the proviso. Plaintiffs supported this proposition by quoting one individual member. The absolute tenuousness of respondents' reliance upon the Hunt case as authority is demonstrated by the following decision rendered by the Chair and reported in the Congressional Record, 68th Cong., 1st Sess., P. 5041. On March 26, 1924, the Army Appropriation Bill was under consideration in the Committee of the Whole House on the state of the Union, when the Clerk read this paragraph:

> "Pay of persons with retired status: For pay of the officers on the retired list, $7,032,337: *Provided,* That no part of this sum shall be paid to Col. John E. Hunt, United States Army, retired."

In making a point of order against the proviso in the paragraph, Representative Dickinson argued:

> "Mr. Chairman, it is my contention that a limitation can not in effect repeal existing law. Under the present existing law it is the duty of the proper officials of the Government to pay to Colonel Hunt the retired pay of a colonel under the pay bill of the Army. That is entirely an executive function. In effect, this proviso repeals that law in that it deprives Colonel Hunt of his pay in this appropriation bill. He could go to the Court of Claims and have a decision rendered and receive his pay. *It is an interference with an executive function.* It is not a proper limitation on an appropriation bill."

The Chairman ruled:

> "If the gentleman's argument were addressed to the merits of the question, what the gentleman from Iowa had said would be persuasive, but it has been pretty thoroughly established that Congress may refuse to appropriate for a perfectly legitimate purpose. In the mind of the Chair it is purely a limitation. It does not restrict the discretion of any executive officer.

It simply declines to appropriate for a perfectly legal object. The Chair overrules the point of order."

In Col. Hunt's case, no vote was taken on the question of legislative *power* to withhold appropriations for salaries. The only question which was before the House was whether or not the employee involved *should* be paid.

The third instance offered to support the proposition that "legislative precedents condemn Section 304" was the action taken on an amendment providing that no part of certain funds could be used for the payment of salary to the Superintendent of the Great Smoky National Park. Again, they rely upon the views of two members of Congress as reflecting a legislative intent to establish the precedent that Congress is without power to adopt Sec. 304. Again, the action of Congress in no way amounts to a recognition of lack of power.

In answer to respondents' reference below to the case of Dr. Ruth Gruber as a precedent, it is sufficient to indicate that this amendment was adopted by the House; and that while it was not agreed to in the Senate, no objection was made on constitutional grounds.

Perhaps the most tenuous of all "legislative precedents" cited is a reference to the fact that Congress took no action on a bill introduced to prevent the use of certain funds "during the service of the present Governor of Puerto Rico." Of course, since this bill (like hundreds of others) was never brought up on the floor, it was never considered. The mere introduction of a bill and the fact that "it died" is utterly immaterial. Furthermore, the bill referred to by plaintiffs originated in the Committee on Agriculture; and since this committee has no jurisdiction of appropriation bills, under the rules of the House, the measure could not have been considered on the floor.[74]

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[74] Rule XXI, 4 provides "No bill or joint resolution carrying appropriations shall be reported by any Committee not having jurisdiction to report appropriations." Rules and Manual, House of Representatives, p. 397. Rule XI, 3 places jurisdiction of appropriations in the Committee on Appropriations, *id.*, p. 309.

The last example advanced by respondents in the Court of Claims is the action of the Senate in 1942 in striking out a proviso which would have withheld any part of an appropriation for the payment of salary to Goodwin Watson, one of the present respondents. The action taken on the Watson proviso in 1942 is not a trustworthy precedent, for the reason that it was overruled the following year, when Congress enacted Section 304.

In summarizing the argument that legislative precedents condemn Section 304, respondents, in effect, asked the Court to consider also "the dangers" which they contend Congress has usually recognized in the practice of which Section 304 is the result. We agree that many governmental practices may be fraught with dangers. Such dangers are not peculiar to action of the legislative department. However, the fact that a legislative policy may be dangerous has no bearing upon the constitutionality thereof. The courts have held repeatedly that the judiciary will not attempt to determine whether or not a legislative policy is wise, may be abused, or whether the policies of Congress are expedient or inexpedient. It is too well settled for argument that

> "Considerations of that sort must, in general, be addressed to the legislature." *License Tax Cases*, 5 Wall. 462, 469.

In 1876 the House adopted the "Holman Rule," which obtains today, and which provides that germane amendments to appropriation bills are in order if they "retrench expenditures . . . by the reduction of the compensation of any person paid out of the Treasury of the United States . . ."[75] (Rules and Manual, House of Representatives, Rule XXI, Cl. 2, P. 834). The language of the above rule leaves no doubt that the House construes its power over appropria-

[75] The rule also provides that amendments are in order which "retrench expenditures by the reduction of the number and salary of officers of the United States."

tions to embrace the power to reduce the compensation of *any person* paid out of the Treasury of the United States."[76]

Congress rarely passes any important appropriation bill without incorporating various limitations and conditions.

> "The Committee on Appropriations today, in nearly every bill it reports, does propose some limitations."[77]

Innumerable decisions of the Speaker and Chairman of the Committee of the Whole House indicate conclusively that the House has never had the slightest doubt as to its power to place conditions and limitations on appropriation bills. It was well stated by Chairman Nelson Dingley in 1896 that:

> "The House in Committee of the Whole has the right to refuse to appropriate for any object, either in whole or in part, even though that object may be authorized by law" Cong. Rec., Jan. 17, 1896.

On January 27, 1931, the Chairman ruled in order an amendment to the Independent Offices Appropriations Bill, proposed by Mr. LaGuardia, which provided:

> "That none of the money herein appropriated shall be used to pay the salary of a commissioner whose confirmation has been or is being reconsidered by the Senate or against whom ouster or removal proceedings have been instituted or authorized."

This amendment is of particular interest for the reason that the Senate had made an unsuccessful attempt to recon-

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[76] Ostensibly it might appear that a distinction could be drawn between a reduction of compensation and a reduction to naught. However, such a distinction, if tenable, is immaterial here, since, under plaintiffs' theory, a reduction even to a nominal sum would be "in effect" a removal from office, and, therefore, unconstitutional.

[77] Hon. Charles R. Crisp, Cong. Record, 65th Cong., 3rd Sess., p. 4163. For a voluminous compilation of limitations, conditions, and restrictions on appropriation bills, see "General Legislation Enacted on Appropriation Acts," 1897-1915, GPO.

sider and reject the nomination of a Federal Power Commissioner;[78] and, while the Senate could not withdraw its approval of him, the House had no doubt that funds might be withheld for payment of his salary. The amendment does not appear in the act as finally adopted, for the reason that pursuant to several policy arguments, *inter alia*, that it was improperly drawn, the House rejected the proviso. However, the most vigorous opponents of this limitation admitted that there was no question as to the *power* of the House to withhold the appropriations involved.

The following amendment to the State, Justice, Commerce, and Labor Departments Appropriation Bill was held in order as a limitation;[79]

> "*Provided*, That no moneys appropriated in this act for the enforcement of the prohibition amendment shall be expended in any State the legislature of which declines to directly appropriate a sum equal to the amount appropriated of the Federal appropriation estimated to be expended in said State for the enforcement of the prohibition amendment and laws applicable thereto" (Cong. Rec., 67th Cong., 1st Sess., p. 5210.)

Obviously, under the Constitution, the Congress has no power to order any state to pass legislation of any kind: however, the House had no difficulty in reaching the conclusion that funds might be withheld from any state which declined to enact certain legislation. As in Section 304, the above amendment did not require the states to enact any law. The states thereunder could have enacted the legislation referred to and obtained Federal funds or declined to enact it and foregone the benefit of the appropriation.

To the same effect was the decision of February 24, 1919, on an amendment which provided:

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[78] See *United States v. Smith*, 286 U. S., P. 30.

[79] Cong. Rec., 72d Cong., 1st Sess., p. 4560.

"That no part of the unexpended balance shall be made available for any State which permits the examination of females suspected of venereal disease to be made by a male physician." (Cong. Rec., 65th Cong., 3rd Sess., p. 4163.)

Hon. James R. Mann, perhaps the leading authority of his day, said:

"It is a mere limitation upon the expenditure of the money, precisely on all fours with the proposition about the appropriation for the benefit of soldiers' homes controlled by States. That is probably the leading case on the subject where a proposition was made that no portion of the money appropriated for the benefit of soldiers' homes owned by States should be given to the States if they permitted the sale of intoxicating liquor of any kind, including wine, beer, and so forth . . . It is clearly a limitation." (Idem)

On March 22, 1922, it was held that the House might provide that no part of an appropriation could be used for the payment of troops garrisoned in China, or certain men stationed in other designated areas. Hon. James R. Mann again addressed the Chair:

"Mr. Chairman, the power to do a thing and the exercise of the power are two entirely different things. We could provide in this bill that no part of this money should be paid to anybody in the Army but red-headed men or blue-eyed men. Having the power to make an appropriation, we can put a limitation in as to whom it may be paid . . . and whom it may not be paid to. That is the appropriation. That does not interfere with the power of the President. He can not maintain any troops unless we appropriate the money for it unless he paid it out of his own pocket. We have the power to say that we will not appropriate a dollar for any purpose. There is no power in the world except our constituency which can reverse our action. Having the power to appropriate, having the power to refuse to appropriate, we can appropriate on conditions with limitations. That is all this is. I ques-

tion the advisability of exercising the power. That, however, would be a matter for the Congress to determine. I do not see how there can be any question as to the power to put a limitation on the appropriation . . ." (Cong. Rec., 67th Cong., 2d Sess., p. 4295)

In his decision, the Chair stated that the Congress:

". . . has the power, through its control of the purse strings of the Nation to prevent an appropriation being made under certain conditions. There are a number of precedents on this point which are not worth while to cite, because the merits of the question here involved seem to the Chair entirely clear. . . .

"Congress has the complete and exclusive power to appropriate for the pay of the Army. It may grant or withhold appropriation to any extent it pleases. It has not the power to direct the President to do or not to do a particular thing with reference to the assignment of the Army to this country or that, but having the power to entirely withhold the appropriations that go for the pay of the Army it unquestionably has the power to direct that no part of the appropriations shall be used to pay that portion of the Army that is in a certain country or countries, as this provision does . . ." (Idem)

On January 28, 1911, an amendment was offered to the District of Columbia Appropriation Act providing that no funds appropriated therein could be expended for the construction of a reformatory on a site which had been selected pursuant to a prior statute authorizing such construction. In addressing the Chair, Representative Mann said:

"Does not the law and the Constitution also vest in Congress the discretion as to whether it will or will not make an appropriation for any purpose under the sun? They can go out and locate it where they please; we say that we will not pay the money for it."

The Chair ruled:

"Such a limitation is clearly in order under the rules and practice of the House, even though it forbade the

expenditure of any part of the appropriation for a purpose heretofore specifically authorized by law."[89]

Section 304, of course, did not compel the President to appoint plaintiffs with Senate concurrence—it did refuse an appropriation for their salaries for the reason that they were not so appointed? The Congress was fully cognizant of the constitutional doctrine involved and the extent of its power to deal with the problem. Moreover, it was not lacking in strong precedents to support the course it followed.

On May 21, 1918, Hon. Edward W. Saunders, who had served as Speaker of the House of Representatives and Judge of the Circuit Court of Virginia prior to his election to Congress, as Chairman handed down the following opinion:

". . . If the Chair understands the amendments it is intended as a limitation on the payment of any money under this paragraph until the President has issued a certain indicated proclamation which in his discretion he may or may not issue. *This amendment does not compel him to issue it*, but so long as it is unissued the House does not propose, if the amendment is adopted, to allow the Agricultural Department to have the benefit of the appropriation in this paragraph. In other words the amendment proposes to utilize the right of the House to appropriate, or not to appropriate, in its discretion, to an object authorized by law . . .

"This amendment does not compel the President to issue the proclamation referred to. He may issue it or refuse to issue it in his discretion. But the amendment in substance says to the Department of Agriculture: We propose to withhold from you the benefit of this appropriation during the full period of time during which this proclamation is unissued. That may be a very unreasonable ground for the House to take, but after all is not this question merely one of com-

[89] Chairman John Q. Tilson, Cong. Rec., 61st Cong., 3d Sess., p. 1613.

petency or power resting upon our authority to refuse or award an appropriation? * * *

"The matter proposed to be dealt with is an appropriation of money, and this body has the absolute power to determine whether it will or will not appropriate. In the exercise of that power we may do unreasonable things, arbitrary things, whimsical and absurd things, but after all the question is whether, with respect to the action proposed, we are within our powers . . ." (Italics supplied)

Chairman Saunders had some doubt that the amendment "in the form submitted" was "strictly and technically" correct; however, he resolved the doubt "in favor of the amendment" and remitted the same "to the determination of the Committee." (Cong. Rec., 65th Cong., 2d Sess., May 21, 1918, P. 6868)

On February 14, 1919, during consideration of the Army Appropriation Bill, an amendment was presented to withhold funds for the salary of any officer of the Army who promulgated

"any order prohibiting social intercourse between officers and enlisted men . . . while not on military duty . . ."

A point of order having been made, Chairman Edward W. Saunders, of Virginia, ruled:

"The Chair does not understand what offense is created by this amendment, or what punishment is fixed. A limitation, as has been often stated, deals negatively with the application of money which the House may, or may not appropriate, at its pleasure. It matters not how meritorious the subject matter may be, the House can decline to appropriate for the same. It can put a negative restriction upon the use of the money which is appropriated. We can not prescribe that money shall be used in some particular fashion, but we can provide how it may *not* be used . . .

"What are the provisions of this amendment? It does not impose any duty upon the officers referred

to. It merely declares that when an officer has done any one of the things mentioned, no part of the money appropriated shall be paid to that officer. It may or may not be a wise act on the part of the committee to agree to this amendment, but the Chair is not concerned with that phase of the situation. This amendment is simply a negative inhibition upon the use of the money appropriated. It provides that it shall not be applied under certain indicated conditions.

"It does not deal with anything but money . . . In the judgment of the Chair this is a limitation, conforming to the requirements of the precedents, and the point of order is overruled." (Cong. Rec., 65th Cong., 3d Sess., P. 3315)

In 1921 Senator Tom Connally, then a member of the House, introduced a proviso to the Naval Appropriation Bill, which provided that no funds appropriated therein could be expended:

". . . until the President of the United States shall have invited the Governments of all nations to send accredited delegates to an international convention to be held in the United States to consider ways and means of bringing about joint disarmament."

Despite the President's power under the Constitution to negotiate treaties and in the field of foreign relations, the Chairman held:

". . . the Chair is of the opinion now, as he was on a former occasion, that it is within the power, and he overrules the point of order." (Cong. Rec., 67th Cong., 1st Sess., p. 684)

A provision that no part of an appropriation be expended for salary in connection with any suit to enjoin labor unions from striking also has been held in order as a limitation. On April 7, 1922, the following amendment was offered to the State and Justice Departments Appropriation Bill:

"No part of the amounts appropriated in this paragraph shall be expended for the payment of any salary

> or compensation for legal services in connection with any suit or other proceeding brought in any court to enjoin any officers or members of a labor organization or labor union from suspending or quitting their employment."

The Chairman held that the amendment was in order because it simply proposed to withhold public funds to pay any salary or compensation for legal services rendered by those who do certain things, and which under general law those persons may be authorized or even directed to do. (Cong. Rec., 67th Cong., 2d Sess., p. 5210)

The one competent authority cited by respondents is a legislative precedent which *supports* Section 304 and is, we submit, directly opposed to the proposition for which the respondents cite it as authority. The amendment there involved (presented by Rep. Dirksen) was offered to the Emergency Relief Appropriation Bill on June 12, 1941, and provided:

> "That no part of any appropriations contained in this act shall be used to pay the compensation of David Lasser." (Cong. Rec., Vol. 87, P. 5110)

Respondents stated that, after attacks against its principle, it was agreed to by a vote of 131 to 88. A careful examination of the Congressional proceedings discloses that only three individual members of the House attacked the amendment and neither of them based his objections on constitutional grounds (Cong. Rec., Vol. 87, Pp. 5111, 5112); and that five representatives addressed the House in favor of the proviso, which was adopted June 12, 1941 (id., P. 5113).

Respondents endeavored to minimize this legislative precedent by making the point that "two weeks later, in further debates, the amendment was again attacked" by Rep. Voorhis and Rep. Flanagan. The belated so-called "attack" by Rep. Voorhis was not made on the ground of unconstitutionality, but because he viewed the amend-

ment as an "undignified thing for the House to do" (id., P. 5515). The only other so-called "attack" *was not contained in any debate on the floor of the House,* but was in the form of a prepared statement, or "Extension of Remarks," inserted in the appendix of the Congressional Record by Rep. Flanagan (Cong. Rec., Ap., Vol. 87, P. A. 2982).

Since neither the speech nor the appendix statement was before the House at the time the Lasser amendment was adopted, and since the Congress did not act in accord with these views, neither expression lends even the slightest support to the proposition that legislative precedents condemn Section 304.

On June 13, 1941, while the amendment was still under consideration, a request for a record roll call vote on the Lasser proviso was made by its author, whereupon 214 were recorded for and 114 against the amendment (Cong. Rec., Vol. 87, P. 5151).

The Lasser amendment was debated in the Senate and on June 20, 1941, the Senate went squarely on record in favor of this legislative precedent (Cong. Rec., Vol. 87, P. 5384, 5385).

A recommendation of an appropriations subcommittee that the Lasser proviso be repealed, was rejected by the House (See the legislative decision of Dec. 5, 1941, Cong. Rec., Vol. 87, P. 9494).

Although there was no vote on this decision an opportunity for a vote is afforded on all decisions of the Speaker or Chairman by Rule 1(4) of the House, which provides that such decisions shall be "subject to appeal by *any* member" (See Rules and Manual, House of Reps., Rule I, Sec. 4, P. 286).

Respondents contended in the Court below that the Lasser Amendment was also unconstitutional. Obviously, this opinion is contrary to the well-settled doctrine that—like all other acts—it is presumed constitutional.

The Lasser amendment *was passed by Congress, approved by the President, and became law.*[81] Not only is this case a valid legislative precedent, it is also an executive precedent. The President approved the act in which the proviso was contained, and he made no protest with reference thereto.

(c) *The Congress Has the Power to Appropriate For or to Withhold Appropriations From Individuals By Class or Name.*

We now consider the argument that this Court should deny the Congress power to withhold public funds, as it did by Section 304, because, *inter alia*, it affects individuals and is a permanent limitation on future appropriation acts.

Permanent limitations on appropriation acts which prohibit the use of funds to pay identifiable individuals are not novel. Aside from provisions containing permanent restrictions, most of the temporary limitations

> "once enacted . . . are continued from year to year and become, in substance though not in form, permanent legislation" (Mansfield, "The Comptroller General," P. 8)

Under immemorial practice, Congress has appropriated to individuals by name. A single illustration from the many available will suffice. The First Congress, in "An Act making appropriations for the support of Government for the year one thousand seven hundred and ninety," provided:

> "That out of the aforesaid appropriation . . . the payment of the following sums, not heretofore provided for by law, and estimated in the aforesaid report of the Secretary of the Treasury of the first of March instant, is hereby authorized and intended to be made,

[81] 55 Stat. L. 396.

to wit . . . To *Roger Alden*, for his services, including his office expenses, and the allowance to his clerks, eight hundred and seventy-three dollars, and seventy cents . . ."

The act further provided:

"That the sum of one hundred and twenty dollars, be paid . . . to *Johoiakim M'Toksin*, in full compensation for his services as an interpreter and guide in the expedition commanded by Major-general Sullivan, in the year one thousand seven hundred and seventy-nine; and also the sum of ninety-six dollars to *James Mathers* and *Gifford Dalley*, each, for services during the late recess of Congress." (Italics supplied) (1 Stat. L. 105)

Today, of course, one need only examine the private laws of any Congress to discover innumerable acts directing the Secretary of the Treasury to pay specified sums to individuals by name.

Permanent limitations as to classes of individuals are not uncommon. For example, the Appropriation Act of October 22, 1913, provided that

"No money appropriated by *any act* shall be used, for the compensation of any publicity expert unless specifically appropriated for that purpose" (38 Stat., 212; T. 5, Sec. 54, U. S. C.)

Revised Statutes 1761 (T. 5, Sec. 55, U. S. C.) provides, *inter alia*, that

"No money shall be paid from the Treasury to any person appointed during the recess of the Senate"

if the vacancy occurred when the Senate was in session and unless such person is subsequently confirmed by the Senate.

An early example of a statute permanently barring a designated class from the Federal payroll is contained in

27 Stat. 591, which has been in force for more than a half century, and which provides that

> "No employee of the Pinkerton Detective Agency, or similar agency, shall be employed in any Government service . . ." (Meh., 3, 1893)

While it is well settled that Congress may not designate the person to be appointed to a given office or position, Congress has exercised the power to appropriate for a particular office or position only so long as it is held by an identifiable individual. The Revenue Act of 1924 provided:

> "The salary of the Government Actuary, *so long as the position is held by the present incumbent* [Joseph S. McCoy], shall be at the rate of 7,500 a year" (Revenue Act of 1924, Vol. 43, pt. 1, Stat. L., P. 353)

The appropriation act granting an increase in salary for the Government Actuary provided:

> "For payment of the increase in the salary of the Government Actuary, as provided by Sec. 1102 of the Revenue Act of 1924 for the fiscal years that follow: For 1924—$281.95. For 1925—$2,300." (Defcy. Appro. Act of 1924, Vol. 43, pt. 1, Stat. L., P. 693)

The Act of 1926 also dealt with the same *individual incumbent*:

> "The salary of the Government Actuary, *so long as the position is held by the present incumbent*, shall be at the rate of $10,000 a year" (Rev. Act of 1926, Vol. 44, P. 129, Stat. L., pt. 2)

The above acts did not require President Coolidge to continue Joseph S. McCoy in the position of Government Actuary—he could have been removed by the President at any time; Congress simply provided that the sums specified could be used to pay the Government Actuary only so long as the incumbent (Joseph S. McCoy) occupied the position.

When it proposed the clause in Section 304 conditioning

payment of respondents' salaries upon their appointment by the President with Senate concurrence, perhaps the Senate had in mind, in addition to the Lasser precedent, *supra*, a statute passed during President Madison's administration. The Act of May 1, 1810, *inter alia*, set forth the compensation to be allowed certain secretaries of legations and embassies and secretaries to ministers. Section 2 provided:

> "That to entitle any charge des affaires, or secretary of any legation or embassy to any foreign country, or secretary of any minister plenipotentiary, to the compensation herein before provided, they shall respectively be appointed by the President of the United States, by and with the advice and consent of the Senate . . . and no compensation shall be allowed to any charge des affairs, or any of the secretaries herein before described, who shall not be appointed as aforesaid." (2 Stat. L. 608)

We find no prior statute *requiring* the President to appoint secretaries of legations and embassies or secretaries to ministers by and with the advice and consent of the Senate; however, President Madison, one of the founding fathers, approved the act containing the condition. The Act of 1810 left President Madison an option—he could appoint the designated functionaries by and with the advice and consent of the Senate, or he was free not to appoint them in that manner; Congress, however, provided that no money could be drawn from the Treasury to pay them if they were not so appointed.

> "It must be conceded at once that the sanction of withholding appropriations—an absolute power—might be used to secure an unconstitutional result. Should Congress, for example, repeal existing laws on the subject and appropriate for the salaries of the President and of the Justices of the Supreme Court less than they had been receiving, they would have no legal means of getting their usual pay despite the plain mandate that their compensation 'shall not be diminished.' So

also, if Congress made the appropriations for all governmental expenditures conditional upon the Comptroller General's prior approval of these, it is hard to see how payments could legally be made otherwise. But the absolute quality of the appropriating power does not extend—as against a challenge from the other two branches of government—beyond the sanction for its enforcement, the withholding of appropriations. *The executive is at liberty to treat a condition as unconstitutional if it is prepared also to forego the appropriation to which it is attached;* and the courts might conceivably go further, for they have claimed that separability is ultimately a judicial question." *Mansfield, The Comptroller Genral,* P. 78. (eItalics supplied)

We submit that Section 304 is not a legislative innovation. On the contrary, it is supported, as we have shown, by immemorial precedent.

Section 304 Did Not Deprive Respondents of Any Constitutional Right, Either as a Bill of Attainder, or by Denial of Due Process of Law.

We have demonstrated that the conclusion of the Court of Claims that Section 304 did not remove respondents from office was correct.

In his petition the Solicitor General first raises the question whether Section 304 undertook to terminate respondents' services. The second question raised is, "If so, whether Section 304, is constitutional." It is clear, therefore, that the petition raises no issues regarding the constitutionality of Section 304, unless that provision, as a matter of fact and law, removed the respondents from their offices. Thus, it restricts consideration of the validity of Section 304 under the constitutional prohibition against bills of attainder (Article I, Section 9, Clause 3), and under the due process clause of the Fifth Amendment. However,

in the Court of Claims respondents made various contentions regarding the invalidity of Section 304 under those provisions of the Constitution, and we wish to submit for the court's consideration the following observations concerning those contentions.

(a) *Section 304 Is Not a Bill of Attainder.*

In the Court of Claims respondents relied on several premises to sustain their argument that Section 304 is invalid because of the constitutional provision that "no Bill of Attainder or ex post facto Law shall be passed." (Article I, Section 9, Clause 3.)

Their basic premise was that permanent disqualification from gainful government employment is legislative punishment. Arguing that the prohibition against payment contained in Section 304 constituted punishment, respondents urged that its form, a denial of appropriations, is of no significance. That is to say either that Section 304 is something other than a denial of appropriations, cloaked as such, or that a denial of appropriation may be a bill of attainder.

Respondents' assertion that the form of Section 304 is insignificant must rest, as we have indicated, upon one of two grounds—either that Section 304 being a denial of appropriations was a bill of attainder; or, second, that Section 304 was not, in substance, a denial of appropriations. Plaintiffs relied on the second theory, arguing that Section 304 is not a denial of appropriation because (1) it is permanent legislation; and (2) its effect is to disqualify plaintiffs from office.

We have demonstrated that it is within the power of Congress to appropriate for specific purposes or to withhold money from specific objects, and that the power over appropriations may be exercised by permanent legislation. It is illogical to argue that a permanent denial is not in the nature of a denial of appropriation when a permanent grant

of funds is within the appropriating power. Section 304 was a denial of appropriation.

Respondents conceded that the power to withhold appropriations is unlimited. The tenor of their argument admitted that it would be within the power of this and succeeding Congresses to keep plaintiffs from the federal payroll by a provision in each appropriation measure. Congress having adopted the simpler method, the enactment of one measure containing the prohibition, the respondents assailed it as not being a denial of appropriation.

Respondents' other attack on the nature of the action taken in Section 304 was predicated on their conclusion that its effect was to disqualify plaintiffs from holding office. We have already disposed of the contention that a refusal to pay, *per se*, equals a disbarment from office. All that Section 304 did was to prevent the payment of compensation to respondents and thus prevent the executive agencies concerned from granting them rights to compensation.

The purpose of Section 304 was to deny payment of federal funds to persons examined and deemed unfit by the Congress to receive such funds. The means adopted was refusal to permit the payment of such funds to them. The powers exercised were congressional control over compensation and over the expenditure of federal funds. Respondents, however, assail the action on the ground that the resultant disqualification of plaintiffs from the federal payroll was punishment.[82] They urged that to deny named individuals access to public funds for services to the United States is to punish them.

Again, however, the respondents argued in the alternative, stating that, in fact, Section 304 was intended to punish respondents but, even if it were not, since Congress acted in regard to three named persons, the disqualification

[82] Respondents argued that they were disqualified from holding office. We have rebutted that contention, and it is only necessary to consider Section 304 as a conditional refusal to pay compensation for their future services.

allegedly resulting was punishment. The first contention, that Section 304 was intended to punish respondents for their past conduct, may be disposed of by an examination of the facts. The second thesis, that punishment was inflicted regardless of intention, requires an examination of the cases upon which respondents relied.

Respondents rested heavily upon *Cummings* v. *Missouri*, 4 Wall. 277, 18 L. ed. 356 and *Ex parte Garland*, 4 Wall. 333, 18 L. ed. 366. In each case, the court found that the test oath it invalidated was imposed upon certain classes of persons with intent to punish them for past conduct. After pointing out that the test oath imposed upon priests and ministers bore no real relationship to the performance of their ministerial functions, the court, in *Cummings* v. *Missouri*, rejected the contention that the oath was imposed as a qualification for the callings:

> "The oath could not, therefore, have been required as a means of ascertaining whether parties were qualified or not for their respective callings or the trusts with which they were charged. It was required in order to reach the person, not the calling. *It was exacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment*, and that for many of them there was no way to inflict punishment except by depriving the parties who had committed them of some of the rights and privileges of the citizen." (Italics supplied) 4 Wall. 320, 18 L. ed. 362

In *Ex parte Garland*, the court stated:

> "The legislature may undoubtedly prescribe qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life. The question, in this case, is not as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a means for the infliction of punishment, against the prohibition of the Constitution. That this result cannot be affected indirectly by a state under the form of creating qualifica-

tions we have held in the case of *Cummings* v. *Missouri*, and the reasoning by which that conclusion was reached applies equally to similar action on the part of Congress." 4 Wall. 379, 18 L. ed. 370.

It is apparent that in each case the court based its conclusion upon a finding that the disqualification imposed by the test oath was intended as punishment, not upon the doctrine that it was, *per se*, punishment. It viewed the lack of relationship between the oaths exacted and qualification for the callings in question as evidence of the intention of the legislature.

While the decisions in the Cummings and Garland cases were based squarely upon a finding of intention to punish, there is dictum in each case which might support the proposition that disqualification from office is punishment *per se*. These dicta are as follows:

> "The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to everyone, and that in the protection of all these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined." *Cummings* v. *Missouri*, at 4 Wall. 321, 18 L. ed. 362

> "And exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct." *Ex parte Garland*, at 4 Wall. 377, 18 L. ed. 370.

However, that doctrine subsequently was rejected by the United States Supreme Court. *Dent* v. *W. Va.*, 129 US 114, 32 L. ed. 623; *Hawker* v. *New York*, 170 US 189, 42 L. ed. 1002; *Rietz* v. *Michigan*, 188 US 505, 47 L. ed. 563.

Dent v. *W. Va.* sustained a state law prescribing new qualifications for practicing physicians and making it a misdemeanor to practice without them. It disqualified persons

already practicing who could not produce proof of graduation from a reputable medical school. Distinguishing the Cummings and Garland cases, the court said:

> "The Constitution of Missouri and the Act of Congress in question in those cases were designed to deprive parties of their right to continue in their professions for past acts or past expressions of desires and sympathies, many of which had no bearing upon their fitness to continue in their professions. The law of West Virginia was intended to secure such skill and learning in the profession of medicine that the community might trust with confidence those receiving a license under authority of the State." *Dent* v. W. Va., 129 US 114, 118, 32 L. ed. 623.

Hawker v. *New York* held valid a law barring from the practice of medicine those convicted of a felony before its enactment. In the course of its opinion, the court declared:

> "It is not open to doubt that the commission of crime, the violation of the penal laws of a state, has some relation to the question of character. It is not, as a rule, the good people who commit crime. When the legislature declares that whoever has violated the criminal laws of the state shall be deemed lacking in good moral character it is not laying down an arbitrary or fanciful rule,—one having no relation to the subject matter, but is only appealing to a well-recognized fact of human experience; and if it may make a violation of criminal law a test of bad character, what more conclusive evidence of the fact of such violation can there be than a conviction duly had in one of the courts of the state?" 170 US at page 196, 42 L. ed. at page 1006.

The Hawker case directly repudiates the dicta that disqualification from office or avocation or profession because of past conduct is *per se* punishment. It affirms the principle, also declared in *Cummings* v. *Missouri*, that

> "The deprivation of any rights, civil or political, previously enjoyed, *may be punishment*; the circumstances attending and the causes of the deprivation determin

ing this fact." (Italics supplied) 4 Wall. 320, 18 L. ed. 362.

Nor is respondents' contention that intention is of no importance when Congress deals with a named class or group a valid argument. It is one which finds no support in any of the cases cited by respondents, and is equally unsupported by reason.

The argument that an action taken in regard to a class sufficiently small as to be named, *eo nomine*, automatically is punitive in nature because it deprives them of the future exercise of a privilege, needs no answer. While action taken only in regard to some members of a class might be deemed to be evidence of punitive intent, there is no assertion or proof herein that respondents did not constitute the entire class. And, in any event, the record proves that Congress did not enact Section 304 to punish respondents for their past conduct. Just as the lack of a reasonable relationship between the test oath and the avocations indicated to the court in *Cummings* v. *Missouri* that the Congress intended to punish, so do the records in these cases conclusively demonstrate that the action taken was intended to protect the public welfare and not to punish.

By an assertion that the conduct of the respondents which convinced the legislature of their unfitness to remain on the public payroll bore no necessary relation to their work respondents in the lower court attempted to avoid the conclusion which the facts impel. The answer to that contention effectively was made by Mr. Justice Miller in a dissenting opinion delivered in *Ex parte Garland*, *supra*, wherein he stated:

> "That fidelity to the government under which he lives, a true and loyal attachment to it, and a sincere desire for its preservation, are among the most essential qualifications which should be required in a lawyer, seems to me to be too clear for argument. The history of the Anglo-Saxon race shows that, for ages past the members of the legal profession have been powerful for

good or evil to the government. They are, by the nature of their duties, the molders of public sentiment on questions of government, and are every day engaged in aiding in the construction and enforcement of the laws. Few among their members are necessarily selected the judges who expound the laws and the Constitution. To suffer treasonable sentiments to spread here unchecked, is to permit the streams on which the life of the Nation depends, to be poisoned at its source." 4 Wall. 385, 18 L. ed. 372

Can it be said that the same high degree of fidelity and attachment to our system of government and the same sincere desire for its preservation are not valid requisites which the Congress may demand of those whom it pays from the public funds entrusted to its care? To us it would seem unconscionable to conclude that such fidelity is not a qualification for public office and that a refusal to expend the public moneys for the payment of employees and officers not possessed of that fidelity is punishment. The legislature has the affirmative duty not to expend the public funds for purposes contrary to the public welfare. Having ascertained that employees lack that fundamental qualification, the Congress would be derelict in its duty if it permitted them to receive compensation, merely because the power to remove them lies in the executive branch.

In this connection, a recent decision of the District Court of the United States for the District of Columbia in *Friedman* v. *Schwellenbach*, et al (Civil Action No. 27196, decided April 1, 1946) is pertinent. In that case the plaintiff sought a declaratory judgment, mandamus, and injunction, claiming that his discharge by the War Manpower Commission pursuant to order from the Civil Service Commission was improper.

The Commission had ordered his discharge because of his affiliation with the American Peace Mobilization, on the grounds that such membership constituted sufficient evidence to raise a reasonable doubt as to his loyalty to the Government of the United States, making him ineligible

for employment under the War Service Regulations issued pursuant to Presidential Executive Order. Granting the motion of the defendant for summary judgment, the court said:

> "The Commission found reasonable doubt of the loyalty of the plaintiff. It based its finding in part upon the fact that the plaintiff was a member of, and prominently and actively affiliated with the American Peace Mobilization; participated actively in its meetings and affairs, and served on several of its committees. There were reasonable grounds to believe that this organization was formed under the auspices of the Communist Party designed to influence the American people to oppose participation in the war against Germany. Within a month after the German invasion of Russia its name was changed to American Peoples' Mobilization and then favored assistance to Britain and Russia in a war against Germany. It can hardly be said that there could be no reasonable doubt of the loyalty of a member of a communist organization who opposed war against Germany so long as this country was an ally of Great Britain, a democracy, but became an advocate of war when this country became allied with Russia, a communistic and totalitarian state. The defendant did not find that the plaintiff was disloyal. It was not necessary to go so far; it merely found that it had a reasonable doubt of his loyalty."

The record in these cases contains ample evidence to cast a reasonable doubt upon the undivided loyalty of the respondents. It would be unconscionable to argue that in the face of that record the Congress was unwarranted in finding them unfit to receive compensation for their services out of the public treasury. It cannot be argued that the very evidence which justifies executive *removal* of employees from the federal service is inadequate to justify the legislature in asserting its full powers over compensation and the expenditure of the public moneys to deny employees similarly disqualified a place on the federal payroll.

We submit that Section 304 cannot be ruled invalid as a bill of attainder.

(b) *Section 304 Is Not a Denial of Due Process.*

Respondents based their assertion that Section 304 denied them due process on two grounds. They contended that it substantively violated the Fifth Amendment because it was an arbitrary and discriminatory disqualification from holding public office. And they argued that the procedure of the Kerr Committee denied them due process.

The short answer to the second contention is that the procedures of the Kerr Committee are immaterial to the constitutionality of the enactment. As the Court of Claims found, Congress, when it enacted Section 304, did not exercise a judicial function. (R. 39.) The stipulations and findings of fact below show that there was no denial of any procedural rights of respondents by the Kerr Committee.

The investigation conducted by the Kerr Committee was one in aid of the legislative functions, and when Congress passed Section 304 it complied with all procedural requirements of the Constitution regarding the enactment of legislation.

H. Res. 105, 78th Cong., 1st Sess., creating the Kerr Committee, directed it to inquire into "allegations or charges that certain persons in the employ of the several executive departments and other executive agencies are unfit to continue in such employment," and further provided that, "Any legislation approved by the committee as a result of this resolution may be incorporated in any general or special appropriation measure emanating from such committee . . ."

The power of Congress, or either house thereof, to conduct an investigation in aid of its legislative functions is generally recognized. *Sinclair* v. *United States*, 279 US 263; *Electric Bond and Share Co.* v. *SEC*, 303 US 419; *McGrain* v. *Dougherty*, 273 US 135; Re Chapman, 166 US 661; *Kilbourn* v. *Thompson*, 103 US 168.

And the subject matter of the investigation conducted by the Kerr Committee is within the legislative power of Congress. Authority of Congress to prescribe qualifications for

office or employment in the federal government needs no citation. The investigation conducted was a legislative investigation. See *McGrain* v. *Daugherty*, *supra*.

We submit, therefore, that the procedures adopted are not challengeable by the respondents, who voluntarily appeared before the committee, and can have no bearing on the constitutionality of Section 304. *Norwegian Nitrogen Products Company* v. *United States*, 288 US 294.

There remains for consideration respondents' assertion that Section 304 substantively deprives them of life, liberty or property without due process. Respondents urged that it removed them and disqualified them from holding office. We have disposed of the contention that Section 304 removed them.

Therefore, we may discuss the proposition that a refusal to authorize the payment of compensation to named persons violates the due process clause.

Since the control of the moneys in the Treasury is in the hands of Congress, and for its exercise of that control the Congress is responsible only to the people, a refusal to appropriate for any specific purpose, including payments of compensation, may not be assailed as a violation of the due process clause of the Fifth Amendment. Hart's Case, *supra*.

Willoughby points out that in *Davidson* v. *New Orleans*, 96 US 97, which first accepted the doctrine that legislation substantively may violate due process, the reasoning upon which the conclusion was reached was as follows:

> "Shortly stated it was that a legislative act which arbitrarily controls the actions of the individual or the use by him of his property, and still more one which destroys his title to property and transfers it to another individual, amounts to a judgment against him, which judgment is, of course, one rendered in a proceeding which lacks the essentials of due process of law procedurally considered."

He properly concludes:

> "and this reasoning, it must be admitted, still remains the only means by which the field of substantive rights may logically be brought under the operation of a limitation which, by its very words and historical application, is purely procedural in character." (Willoughby Vol. III, p. 1696)

A refusal to appropriate cannot be assailed on the ground that the procedures were improper unless the attack be that requirements for enacting legislation were not met. A refusal to appropriate is an exercise of the legislative function, wherein the Congress exerts a power not affecting and not circumscribed by individual rights to property or liberty. If it be viewed as a judgment, then it is a judgment which the Constitution authorizes the Congress to make, following the procedures therein prescribed for the enactment of legislation.

However, even if it should be decided that a refusal to permit expenditures for compensation is subject to attack under the Fifth Amendment, on the ground that it is arbitrary and discriminatory, Section 304 must stand as constitutional.

The Fifth Amendment contains no equal protection clause and does not prohibit discriminatory legislation. *Hirabyashi* v. *United States*, 320 US 81, 100; *Detroit Bank* v. *United States*, 317 US 329, 337; *Helvering* v. *Lerner*, 314 US 463; *Currin* v. *Wallace*, 306 US 1, 14; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 US 381, 401; *Stewart Machine Co.* v. *Davis*, 301 US 548, 584; Section 304 cannot successfully be assailed upon the premise that it discriminatorily deprived respondents of "liberty"[83] to receive compensation from the United States.

If the provision is assailable under the Fifth Amendment on these grounds, it must be shown to be so unreasonable and unsupported as to amount to an unwarranted depriva-

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[83] There is no property right to unearned compensation. *Embry* v. *United States*, *supra*.

tion of that liberty. The facts completely refute any such conclusion.

To demonstrate that degree of arbitrariness, respondents rely upon the personal character of Section 304. Their argument in essence is that an enactment directed against three named persons, *per se*, is so arbitrary as to deny due process. Significantly, they made no attempt to demonstrate that the facts regarding them did not objectively justify refusing to pay them. In their view, the evidence upon which Congress acted is immaterial; the enactment, being directed at only three persons, is automatically invalid.

The theory which they advanced has been rejected by the courts. In *Keokee Consolidated Coke Co.* v. *Taylor*, 234 US 224, 227, a state law prohibiting certain manufacturing enterprises from paying employees in scrip redeemable only in merchandise was alleged to be invalid under the equal protection clause of the Fourteenth Amendment. Speaking for a unanimous court, Mr. Justice Holmes said:

> "It is more pressed that the act discriminates unconstitutionally against certain classes. But while there are differences of opinion as to the degree and kind of discrimination permitted by the 14th Amendment, it is established by repeated decisions that a statute aimed at what is deemed an evil, and hitting it presumably where experience shows it to be most felt, is not to be upset by thinking up and enumerating other instances to which it might have been applied equally well, so far as the court can see. That is for the legislature to judge unless the case is very clear. Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 81, 55 L. ed. 369, 378, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Central Lumber Co. v. South Dakota, 226 U. S. 157, 160, 57 L. ed. 164, 169, 33 Sup. Ct. Rep. 66; Patsone v. Pennsylvania, 232 U. S. 138, 144, ante, 539, 543, 34 Sup. Ct. Rep. 281. The suggestion that others besides mining and manufacturing companies may keep shops and pay their workmen with orders on themselves for merchandise is not enough to overthrow a law that must be presumed to be deemed by the legislature coextensive with the practical need."

Recently the same principle was declared by the court in *Hirabyashi* v. *United States*, *supra*, P. 100, wherein the court said:

> "The Fifth Amendment contains no equal protection clause and it restrains only such discriminatory legislation by Congress as amounts to a denial of due process. Detroit Bank v. United States, 317 US 329, 337, 338, ante, 266, 270, 271, 63 S. Ct. 297, and cases cited. Congress may hit at a particular danger where it is seen, without providing for others which are not so evident or so urgent."

When it enacted Section 304, the legislature was dealing with a special problem left unremedied by existing legislation. It had before it substantial evidence that respondents were unqualified to draw compensation from the federal payroll. To cope with that evil, the Congress exercised its control over the public funds, confining the extent of its action to the known evil.

Section 304 was not arbitrary in the sense that no reasonable grounds existed for the action taken; nor may it be invalidated by the suggestion that others besides respondents might have been similarly dealt with, but were not.

The records in these cases contain no evidence that when Congress legislated in regard to the three respondents it did not encompass the entire class of persons deemed unfit to receive compensation because of their subversive activities and affiliations. On this point, the following is particularly pertinent:

> "We are told that the signs of an arbitrary preference are written on the statute because the exemption is confined to this particular insolvent when it might have been extended to all other insolvents engaged in a like business. There is nothing to show that any Maryland railroad other than this one was in the hands of a receiver. The assailants of the statute have the burden of proving everything essential to their case." *Williams* v. *Baltimore*, 289 U. S. 36, 42; *Pullman Co.* v. *Knott*, 235 U. S. 22, 25.

We have shown that the power to compensate and to control federal expenditures may be exercised in personam. Respondents, attacking Section 304 as a denial of due process, have not shown that it was unjustified by the facts known to the Congress; nor have they shown that the Congress selected certain persons for action, leaving unaffected others similarly situated. There has been no proof that Section 304 was arbitrary in either respect; and respondents' argument reduces merely to a contention that a statute directed to three named persons must be arbitrary. The answer to that contention is that

> "Congress is the law making branch of the Government and laws made by it are not unconstitutional because they are special, applicable to one or some persons, rather than of general application . . ." *The Menominee Tribe* v. *United States*, 101 Ct. Cl. 10, 18.

The method adopted in Section 304—prohibiting the use of public funds to pay plaintiffs—was reasonably and directly related to the object sought—to prevent the expenditure of public funds to pay compensation to persons Congress deemed unfit to receive them.

> "And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." *Nebbia* v. *New York*, 291 U. S. 502, 525.

VII.

CONCLUSION.

Consideration of the ultimate question will be best aided by addressing ourselves to a few simple inquiries:

1. Was the Congress confronted with any problem requiring, or which might reasonably be thought to warrant, attention of that body?

2. Was the subject matter one within the jurisdiction of Congress, or did it lie in some field forbidden to Congress by the Constitution?
3. What steps did Congress take to inform itself as to the nature and extent of the problem which had been pressed upon its attention and which already had been examined to some extent by its committees?
4. What remedy was adopted?
5. Was this remedy appropriate?

If we find that the problem was real, not imaginary, that the subject was one over which Congress had authority, that the legislative procedures in and of themselves violated no private rights, and that the remedial measure adopted was appropriate, the ultimate question of constitutionality answers itself, in favor of the legislation. We are of opinion that the record requires an ultimate resolution in favor of the statute. Examination of the subject matter by the Congress, and particularly by the Kerr subcommittee, left no doubt that Congressional action was required.

Mr. Chief Justice Hughes, in *T. & N. O. R. Co.* v. *Bro. of Ry. & S. S. Clerks*, 281 U. S. 548, at 570, said:

> "In shaping its legislation to this end, Congress was entitled to take cognizance of actual conditions and to address itself to practicable measures."
> "* * * the extent of regulation depends on the nature and character of the subject and what is appropriate to its regulation." (*Wilson* v. *New*, 243 U. S. 332, 346. See also *U. S.* v. *Darby*, 312 U. S. 100).

The problem with which Congress was dealing was that of subversive activities among Federal civil service employees. Earlier legislation had been adopted. (Hatch Act; Emergency Relief Appropriation Act of 1941; limitations in various other appropriation acts.) But the problem persisted. The earlier statutory provisions did not deal with it in its entirety. Some of these provsions were tempo-

rary in nature. Congress felt a responsibility not to appropriate public funds to persons in Federal employment who were engaging in activities of the general type condemned by Hatch Act (Sec. 9-A). Not only was the subject matter within the jurisdiction of Congress, but the field had already been partially occupied by Congress, and this through use of its power to withhold public funds.

Two courses were open. The Congress could have proceeded along broad, general lines and provided that no part of appropriated funds should be used to pay any part of the compensation of any executive employee who was a member of any of the organizations which the Attorney General had held to be within the scope of Public Law No. 135 (e. g., American League for Peace and Democracy). But the circumstances were such that a *general* proscription would have been arbitrary and extremely unfair to many people who had innocently joined such "communist-front" organizations. The Attorney General himself had so warned Congress.

A far less objectionable course was the one Congress adopted. It proceeded to investigate individual cases, and to withhold appropriations in those instances only where it appeared that the employee complained of was not merely a member of one such organization, but many, and where, in addition to his membership in such organizations, his speeches, writings, and general activities were such as to make it, in the opinion of Congress, inconsistent with the public welfare to continue to appropriate public funds to him.

It is urged that Congress can deal with offices, but not with individuals. But if Congress is attempting to reach a legitimate end, it may employ such means as are appropriate. No express provision of the Constitution forbids Congress to deal with individuals where that is necessary or appropriate.

> "Time with its tides brings new conditions which must be cared for by new laws. Sometimes the new

conditions affect the members of a class. If so, the correcting statute must apply to all alike. Sometimes the new conditions affect one only or a few. If so the correcting statute may be as narrow as the mischief. The constitution does not prohibit special laws inflexibly and always. It permits them when there are special evils with which existing general laws are incompetent to cope. The special public purpose will then sustain the special form . . . The problem in last analysis is one of legislative policy, with a wide margin of discretion conceded to the lawmakers. Only in cases of plain abuse will there be revision by the courts. * * * If the evil to be corrected can be seen to be merely fanciful, the injustice or the wrong illusory, the courts may intervene and strike the special statute down. * * * If special circumstances have developed, and circumstances of such a nature as to call for a new rule, the special act will stand." (Mr. Justice Cardozo in *Williams* v. *Mayor & City Council of Baltimore*, 289 U. S. 36, 46. (1932)).

And because Congress was dealing in Section 304, not with occupants of fixed identifiable, statutory offices, but with employees paid from lump sum appropriations, the only appropriate method was by exception to the general appropriation acts.

It is argued that Congress could reduce the compensation, but could not withhold it entirely. But we are dealing with employees paid from lump sum appropriations. How could Congress reduce the salaries of respondents except by name, and still provide for the salaries by lump sum appropriations? The statute is therefore not to be read as a law applying to three named persons only, not as special legislation singling out individuals for a special rule of law, but as providing *exceptions* to the general directions and authorzations otherwise made by law. Section 304 was not a "rider" to an appropriation act, dealing with a subject foreign to the balance of the Act. It was intimately related to the Act, forming an exception thereto. Its inclusion in an appropriation act was not only appropriate, but

the most appropriate method Congress could have adopted.

Section 304 was not addressed to respondents, though it referred to them. It imposed no obligations on them, and conferred no justiciable rights upon them. It required no one to perform any act. It was a direction to the disbursing officers, just as the Public Contracts Act considered in *Perkins, et al.* v. *Lukens, et al.*, 310 U. S. 113, was held by the Supreme Court to be a direction to the contracting officers of the Government, conferring no justiciable rights on those contractors adversely affected.

It is objected that Section 304 is arbitrary, special legislation, singling out respondents for a rule not applicable to all. Such a conclusion is not warranted. The evidence before Congress warranted Congress in going as far as it went in Sec. 304. It is not required that legislation completely exhaust the field to which it is addressed.

> "We cannot, therefore, indulge in the loose assumption that when Congress adopts a new scheme for federal industrial regulation, it thereby deals with all situations falling within the general mischief which gave rise to the legislation."
>
> (Mr. Justice Frankfurter in *Kirschbaum* v. *Walling*, 316 U. S. 521.)

In the *Jones* and *Laughlin* case (301 U. S. 1, 46) the National Labor Relations Act was challenged on the ground, *inter alia*, that it proscribed certain activities of employers, but left labor unions to do acts of the same character free from the restrictions of the Act. This argument was rejected, the Supreme Court, through Mr. Chief Justice Hughes saying:

> "The Act has been criticized as one-sided in its application; that it subjects the employer to supervision and restraint and leaves untouched the abuses for which employees may be responsible; that it fails to provide a more comprehensive plan,—with better assurances of fairness to both sides and with in-

creased chances of success in bringing out, if not compelling, equitable solutions of industrial disputes affecting interstate commerce. But we are dealing with the power of Congress, not with a particular policy, or with the extent to which policy should go. We have frequently said that the legislative authority, exerted within its proper field, need not embrace all the evils within its reach. The Constitution does not forbid 'cautious advance, step by step,' in dealing with the evils which are exhibited in activities within the range of legislative power. *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401, 411, 50 L. ed. 246, 250, 26 S. Ct. 66; *Keokee Consol. Coke Co.* v. *Taylor*, 234 U. S. 224, 227, 58 L. ed. 1288, 1289, 34 S. Ct. 856; *Miller* v. *Wilson*, 236 U. S. 373, 384, 59 L. ed. 628, 632, 35 S. Ct. 342, L. R. A. 1915 F., 829; *Sproles* v. *Binford*, 286 U. S. 374, 396, 76 L. ed. 1167, 1183, 52 S. Ct. 581. The question in such cases is whether the legislature, in what it does prescribe, has gone beyond constitutional limits."

Even therefore if it were conceded that Section 304 did not reach all those as to whom Congress might have made similar provision, the statute would not thereby be invalidated. Nothing prevents the legislature making a cautious approach, step by step, in dealing with a problem confronting it. *To have done otherwise in this case, in the light of the warning provided by the Attorney General, would have been to take the very arbitrary action Section 304 was designed to avoid.*

One who alleges that legislation is arbitrary or discriminatory as to him is under a burden of showing in what respect that is true. The mere allegation of discrimination is not enough. And in the present case, respondents failed, both in their petitions and in their briefs, to make any claim that those persons embraced within Section 304 are not the only persons similarly situated. All that the Constitution requires of legislation is that it generally impose similar burdens or restrictions on all similarly situated. The courts cannot presume that Sec. 304 does not do so.

Nor is there any reason why Congress, in the exercise of its control over public funds, cannot make distinctions

of degree as well as kind. (*Carmichael v. Southern Coal and Coke Co.*, 301 U. S. 495.) If Congress was of opinion that appropriations to pay the salaries of some persons investigated would not be for the general welfare, it could so provide, even though it reached a contrary conclusion as to others investigated, in the light of the evidence.

Respondents are not consistent in their attack on Sec. 304 when they condemn it as singling out individuals, rather than dealing with general categories, for they recognize that an act may be a bill of attainder although it deals with classes, and the persons to be affected are not named in the bill. In that view, if Section 304 were held invalid, the validity of the Hatch Act and of every other measure now on the books or hereafter passed, by which Congress undertook to deny use of Federal funds for payment of salaries to members of proscribed *classes* would be drawn in question.

But the implications of a decision against the Government in the present cases would go much further. If the court should undertake to set aside Sec. 304 because of a claimed Congressional purpose to remove plaintiffs from office or employment, will it not thereby subject to the possibility of judicial scrutiny every limitation on an appropriation act; every reduction of an employee's previous compensation, every abolition of an agency or office, every failure or refusal to continue prior appropriations, where the employees adversely affected claim that the real purpose was to remove them by freezing them out or starving them out?

Furthermore, it is clear that under settled rules of construction, Section 304 is inseparable from the remainder of the Act of which it is a part, and this Section can not be held invalid without the invalidity extending to the entire statute.

Respondents and the Attorney General were in accord in their original briefs that the Act would not have become law if Section 304 had been deleted. That was the basis of

the Attorney General's contention that Section 304 was not entitled to the usual presumption of validity.

The President's message, after he signed the Act, is significant in this regard:

> "The Senate rejected the compromise as incorporated in this bill once, and agreed to it only after the House conferees *had refused to agree to any bill* without a provision aimed at the removal of these three named individuals."

While not agreeing with the President's legal conclusions as to the effect of Sec. 304, we agree thoroughly that the Urgent Deficiency Appropriation Act of 1943 would not have become law without containing Section 304 or some satisfactory substitute. The intention of Congress in this respect is clear.

The Court cannot find in the legislative history of the Urgent Deficiency Appropriation Act of 1943 any support for the proposition that Congress would have passed the Act without Section 304. It can not find any expression of Congressional intent that the Act should stand if Section 304 fell. The history of the Act, the insistence of the House through five conferences with the Senate, the language of the Senate conferees in reporting to the Senate, and the language of the President in signing the Act "reluctantly," with Section 304, because he thought the alternative was *no appropriation Act*, all disclose a Congressional intention that the Act should become effective wholly or not at all.

It is alleged that the Act does not represent a true or legitimate exercise of the Congressional power over appropriations, but that the exercise of the power over appropriations was a mere cloak for a more sinister purpose,—that of invading the executive prerogative and effecting a removal from executive employment. *We may concede at once that many members of Congress desired that respondents should be removed from office.* The fact is, however, that the statute as finally adopted did not remove the re-

spondents, or either of them, from office, nor did it require the Executive to do so. What it did was to say to the disbursing officers of the Government: You may not draw from the Treasury any public funds to pay as salaries to the respondents after November 15, 1943, unless prior to that date they have been appointed and confirmed as herein provided. The Act did not require the Executive to do any act of any kind, by November 15, or any other date, or at all. What it did was merely to make unavailable *any* public funds for payment of salaries for any services after that date, unless the President exercised the option of making the appointment. Whether the President made the appointment or did not do so, no compulsion was placed upon him and no invasion of his prerogatives was involved.

The Act was clearly an exercise of the power over appropriations and not an attempted exercise of a power of removal. When Congress has desired to effect removal it has not been found wanting in language to express its desire.

There is no distinction more readily apparent than that between office and compensation. This is perhaps best illustrated by the fact that as of January, 1945, there were on the rolls of the Federal Government 311,000 persons who were officers or employees but to whose offices or employment no compensation attached.

The Constitution itself, while recognizing the need for officers and employees in the various departments of Government, does not require that any of them, save the President, the Judges, and members of the legislature, *shall receive compensation*. It will be noted, also, that these provisions, requiring the payment of a compensation and providing specifically that the compensation of *particular incumbents* shall not be reduced, is a direct precedent of the highest order of authority, for the proposition that salaries may be dealt with as to particular identifiable and identified persons. The requirement against reducing salaries speaks in terms of the *officer*, not the *office*.

The distinction between office and compensation has been recognized from earliest times, by the courts, by the Comptroller General, and by others in positions of authority.

There have, indeed, been times when Congress, by failure to enact annual appropriations acts before the beginning of a fiscal year, has left agencies and instrumentalities without funds for current operation. If the fact that no funds were available for salaries were tantamount to removal from office, the whole business of Government would in such circumstances cease, for the former officers of Government could not during the interim exercise any of the powers, authorities and duties attaching to their offices, or, if they did so, any action taken or obligations entered into, might readily be attacked as *ultra vires*.

But enough has been said to show plainly that the holding of office or employment is a thing distinct from receiving compensation, and that the status may exist without the emoluments.

It may be conceded that in general and subject to some limitations not yet determined, the matter of removal of Federal executive employees is the business of the Executive; but it is no less true that the making or withholding of appropriations is the business of Congress.

As said by Mr. Justice Frankfurter in *Korematsu* v. *United States*, 323 U. S. ——, 89 L. ed. Adv. Op. 202:

> "To find that the Constitution does not forbid the military measures now complained of does not carry with it approval of that which Congress and the Executive did. That is their business, not mine."

There are many areas in which the exercise of acknowledged powers by one of the three great departments of Government may impinge upon one or both of the others. But this, in the very nature of things, is an inevitable concomitant of our system. The remedy is one that depends upon mutual cooperation between the departments and not

upon either of them being relegated to a position of dependency upon the other in matters over which both have some jurisdiction, as is particularly the case in matters of regulation and control over Federal civil employees in the departments and independent agencies of Government. The very fact that such areas of possible conflict exist is the strongest evidence that when occasional conflicts arise they are not to be dealt with by *judicial* action, for the questions are primarily political, not justiciable, and the immediate effect of a judicial determination would in all likelihood be to produce rather than to discourage that "collision * * * between the Executive and Legislative Departments of the Government" which has caused the Supreme Court in such cases as *Mississippi* v. *Johnson*, 4 Wall. 475, to refuse to interfere in what was clearly a political controversy, although there, as in most other such cases, injury to private rights was claimed.

Mr. Justice Brandeis, in *Myers* v. *United States*, said:

> "The separation of the powers of government did not make each branch completely autonomous. It left each, in some measure, dependent upon the others, as it left to each power to exercise, in some respects, functions in their nature executive, legislative, and judicial. Obviously the President can not secure full execution of the laws, if Congress denies to him adequate means of doing so. Full execution may be defeated because Congress declines to create offices, indispensable for that purpose. *Or, because Congress having created the office, declines to make indispensable appropriation.* Or, because Congress having both created the office and made the appropriation, prevents, by restrictions which it imposes, the appointment of officials who in quality and character are indispensable to the efficient execution of the law. If, in any such way, adequate means are denied to the President, the fault will lie with Congres. The President performs his full constitutional duty, if, with the means and instruments provided by Congress and within the limitations prescribed by it, he uses his best endeavors to secure the faithful execution of the laws enacted. Compare *Ken-*

dall v. United States. (12 Pet. 524, 613, 626." (Italics supplied.)

Respondents have cited Madison, The Federalist, No. 47. They fail to cite No. 48, *et seq.* In No. 48 Madison says:

> "It was shown in the last paper that the political apothegm there examined does not require that the legislative, executive, and judiciary departments should be wholly unconnected with each other. I shall undertake, in the next place, to show that unless these departments be so far connected and blended as *to give to each a constitutional control over the others*, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained." (Italics supplied.)

And in The Federalist, No. 51, Madison says:

> "But it is not possible to give to each department an equal power of self-defense. In republican government, the legislative authority necessarily predominates."

Not only are these areas of possible conflict between the great departments of Government inherent in our system of checks and balances, but there is ever present the possibility that in the exercise of public rights and authority private rights will be affected.

As Mr. Justice Roberts said in *Nebbia* v. *New York*, 291 U. S., at p. 524:

> "These correlative rights, that of the citizen to exercise exclusive dominion over property and freely to contract about his affairs, and that of the state to regulate the use of property and the conduct of business, are always in collision. No exercise of the private right can be imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of the citizen which will not to some extent abridge his liberty or affect his property. But subject only to constitutional restraint the private right must yield to the public need."

Of the consequential injuries resulting from the exercise of public authority, Cooley has written:

> "It is a general rule that no one has a vested right to be protected against consequential injuries arising from a proper exercise of rights by others. This rule is peculiarly applicable to injuries resulting from the exercise of public powers. Under the police power the State sometimes destroys, for the time being, and perhaps permanently, the value to the owner of his property, without affording him any redress. The construction of a new way or the discontinuance of an old one may very seriously affect the value of adjacent property; the removal of a county or State capital will often reduce very largely the value of all the real estate of the place from whence it was removed; but in neither case can the parties whose interests would be injuriously affected, enjoin the act or claim compensation from the public. The general laws of the State may be so changed as to transfer, from one town to another, the obligation to support certain individuals, who may become entitled to support as paupers, and the constitution will present no impediment. The granting of a charter to a new corporation may sometimes render valueless the franchise of an existing corporation; but unless the State by contract has precluded itself from such new grant, the incidental injury can constitute no obstacle. But indeed it seems idle to specify instances, inasmuch as all changes in the laws of the State are liable to inflict incidental injury upon individuals, and, if every citizen was entitled to remuneration for such injury, the most beneficial and necessary changes in the law might be found impracticable of accomplishment." (Cooley, 8th ed., pp. 795, 796.)[84]

In the present case, no vested rights of respondents were affected. They had at most an interest in expectancy.[85] The statute had no retroactive application. It was passed in July and was not to become effective until November.

[84] Cf. *U. S.* v. *Darby*, 312 U. S. 100, 118, where it was urged that the Act was invalid because it required plaintiff to conform his purely local business to the requirements of the Act.

[85] See Cooley, p. 749.

They knew that if they performed services after November 15, 1943, and the condition of the statute had not been met, they would receive no salaries. They were charged also with knowledge that their executive superiors had no authority to obligate the Government to pay them after November 15, 1943.

The disbursing officers of the Government recognized that they were not authorized after November 15, 1943, to withdraw any money from the Treasury to pay the plaintiffs. Any appropriations theretofore made have long since been expended or have reverted to general funds of the Government.

A judgment of the courts in favor of respondents could not today be paid except by virtue of subsequent appropriations made by Congress for that purpose. The Congress has already stated unequivocally, through Section 304, that it is unwilling to make such appropriation. The control of the public purse is lodged exclusively in Congress. Congress is directed by the Constitution to make appropriations only for the general welfare. Its action in adopting Section 304 is equivalent to a finding on its part that an appropriation to respondents would not be for the public welfare. The determination of the Congress not to permit the withdrawal of public funds from the public Treasury should be respected.

As said by this Court in *Reeside* v. *Walker*, 11 How. 272:[86]

> "The difficulty in the way is the want of any appropriation by Congress to pay this claim. It is a well known constitutional provision, that no money can be taken or drawn from the Treasury except under an appropriation by Congress. * * *
>
> "However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of anything not thus previously sanctioned. Any

[86] Plaintiff Reeside sought to recover compensation for services rendered the Post Office Department in the transportation of mail.

other course would give to the fiscal officers a most dangerous discretion.

"*Hence, the petitioner should have presented her claim on the United States to Congress, and prayed for an appropriation to pay it.* * * But without such an appropriation it cannot and should not be paid by the Treasury, whether the claim is by a verdict or judgment, or without either. * * *"

Respondents having elected to perform services after November 15, 1943, in the face of the statute which denied funds with which to compensate them, the present suits should be dismissed. Certainly a judgment should not be rendered which can under no circumstances be effective without a subsequent appropriation by Congress,[87] — an appropriation which Congress in the exercise of its discretionary powers has already determined would not be in the public interest.

Respectfully submitted,

JOHN C. GALL,
Special Counsel for
The Congress of the United States
Under House Resolution 386 and Public Law 249
78th Congress

DEAN HILL STANLEY,
WILLIAM E. HOWE,
KARL M. DOLLAK,
JOS. G. BUTTS, JR.,
JOHN E. RITZERT,
CLARK M. ROBERTSON,
Of Counsel.

Southern Building,
Washington, D. C.

April 19, 1946.

[87] A fact which clearly distinguishes this case from that of *Tolerton* v. *Gordon*, *supra*, relied upon by respondents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

UNITED STATES, *Petitioner*,

v.

ROBERT MORSS LOVETT.

UNITED STATES, *Petitioner*,

v.

GOODWIN B. WATSON.

UNITED STATES, *Petitioner*,

v.

WILLIAM E. DODD, JR.

MOTION OF NATIONAL LAWYERS GUILD FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE, AND BRIEF OF AMICUS CURIAE.

Robert W Kenny,
of counsel

NATIONAL LAWYERS GUILD,
By MARTIN POPPER,
Executive Secretary.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CONTENTS.

	Page
Motion for Leave to File Brief as Amicus Curiae	1
Brief of National Lawyers Guild as Amicus Curiae	3
Preliminary Statement	3
Argument	4
I The Court of Claims Was Presented With Justiciable Controversies	4
II Section 304 is Unconstitutional as a Deprivation of Due Process of Law in Violation of the Fifth Amendment, as Well as a Bill of Attainder and an Improper Encroachment on the Executive Branch of the Government	6
Conclusion	8

TABLE OF CASES.

Currin v. Wallace, 306 U. S. 1	7
Frothingham v. Mellon, 262 U. S. 447	5
Hirabayashi v. U. S., 320 U. S. 81	7
Humphrey's Executor v. U. S., 295 U. S. 602	5
Miguel v. McCarl, 291 U. S. 442	6
Myers v. U. S., 272 U. S. 52	6
Perkins v. Elg, 307 U. S. 325	6
U. S. v. Corrick, 298 U. S. 435	4
U. S. v. Langston, 118 U. S. 389	5
U. S. v. Wickersham, 201 U. S. 390	5

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No. 811.

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WILLIAM E. DODD, JR.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

May it Please the Court:

The undersigned as counsel for the National Lawyers Guild respectfully moves this Honorable Court for leave to file the accompanying brief in these cases as *Amicus Curiae*. Written consent of all parties to the litigation has been obtained.

MARTIN POPPER,
Executive Secretary,
NATIONAL LAWYERS GUILD.

Supreme Court of the United States

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BRIEF OF NATIONAL LAWYERS GUILD AS AMICUS CURIAE.

PRELIMINARY STATEMENT.

This brief is submitted on behalf of the National Lawyers Guild, a professional association of Lawyers throughout the nation. Numerous members of the Guild are lawyers in the employ of the Federal Government. The constitutional issues of far reaching importance affecting vital civil liberties, presented in this case command the interest of

every lawyer in the nation. In addition, the Guild is especially interested in the questions presented of the extent to which federal employees have a constitutional right to be free from arbitrary restrictions affecting their employment which may be imposed by Congress.

Since the facts in these cases and the extensive body of law bearing on the issues presented have been so thoroughly presented in the briefs of respondents and of the United States, it would not be of assistance to the Court to retrace that ground here. Accordingly, the discussion in this brief is restricted to points of interest to the Guild, especially to those of its members who are in the employ of the Federal Government. These points are that the Court of Claims was presented with justiciable controversies, and that Section 304 is unconstitutional as a deprivation of liberty without due process of law in violation of the Fifth Amendment, as well as a Bill of Attainder, and an improper encroachment on the executive branch of the Government.

ARGUMENT.

I. The Court of Claims was Presented with Justiciable Controversies.

At the request of counsel appointed by the subcommittee of the House Committee on appropriations pursuant to H. Res. 386, 78th Cong., 1st Sess. (hereinafter referred to as "Special Counsel"), the Government, in its petition for writs of *certiorari*, has raised the question whether the Court of Claims was presented with justiciable controversies. In any event, this is a question always open to inquiry by this Court. *U. S.* v. *Corrick*, 298 U. S. 435. When, as in this case, grave constitutional issues of far-reaching significance are involved, this Court would certainly not pass on to a resolution of those issues unless it were satisfied that a justiciable controversy necessarily requiring their resolution was presented. It is submitted that, on the facts in these cases not only are justiciable controversies presented, but their disposition unavoidably requires an adjudication on the constitutionality of Section 304.

It is indisputable that the respondents have, by the action of disbursing officers, acting solely pursuant to the command of section 304, been denied compensation for services rendered in their Government employment for specified periods subsequent to November 15th, 1943. And the right of federal employees to resort to the Court of Claims to recover compensation claimed to be unlawfully withheld where the measure of recovery is clearly defined has heretofore been unquestioned. See *Humphrey's Executors* v. *U. S.*, 295 U. S. 602; *U. S.* v. *Wickersham*, 201 U. S. 390; *U. S.* v. *Langston*, 118 U. S. 389.

No basis for departing from this well settled body of authority appears in this case. Certainly none is afforded by the fact that Congress has chosen to act with respect to the three named respondents by exercise of its appropriation power. And the case of *Frothingham* v. *Mellon*, 262 U. S. 447, lends no support to such a view. For in that case, the plaintiff challenged the particular exercise of Congressional appropriation power only in his capacity as a taxpayer, and could not show that the expenditure of the funds appropriated inflicted on him any immediate injury of a legally recognizable character. Here, on the contrary, Section 304 contains an explicit direction that funds otherwise available for the payment of the compensation earned by the respondents shall be withheld. The injury inflicted by the section on respondents is thus clear and ascertainable.

Moreover, in situations where the salary for an office has been fixed by law, and a subsequent appropriations act makes available a lesser sum, it has been held that the federal employee may recover the difference between the amount actually paid under the appropriations act, and the salary prescribed by statute in a suit in the Court of Claims, *U. S.* v. *Langston*, 118 U. S. 389, *Graham* v. *U. S.*, 1 Ct. Cls. 381. There appears to be no difference in principle between these situations and that presented here, where the prescribed compensation is wholly withheld by the challenged provision of the appropriations act.

It may be contended by special counsel that, in challenging the validity of Section 304, respondents are seeking not only a judgment for salary earned but also a declaration of their eligibility to hold office; that this is not a remedy which may be appropriately sought in the Court of Claims which can only issue a money judgment; and that these actions are therefore not controversies cognizable in the Court of Claims. The short answer to such a contention is that the Court of Claims does at least have jurisdiction to render a judgment for compensation earned by respondents, and does have jurisdiction to pass on the validity of Section 304 if it is necessary to determine whether compensation was unlawfully withheld from respondents. Cf. *Myers* v. *U. S.*, 272 U. S. 52. And the Court of Claims is not ousted of this jurisdiction by the fact that respondents have elected to pursue this clear remedy and have not pursued other remedies not as clearly established which might have been efficacious in affording more complete protection against all the deprivations actually inflicted by Section 304, as for instance an action for a declaratory judgment of the invalidity of Section 304 and an injunction directing the disbursing officers not to withhold compensation solely by reason of Section 304. Cf. *Miguel* v. *McCarl*, 291 U. S. 442; *Perkins* v. *Elg*, 307 U. S. 325.

II. Section 304 is Unconstitutional as a Deprivation of Due Process of Law in Violation of the Fifth Amendment, as Well as a Bill of Attainder, and an Improper Encroachment on the Executive Branch of the Government.

Although it is generally salutary to adhere to a judicial version of Occam's Razor, that grounds for a decision should not be multiplied beyond those actually necessary to sustain the decision, a holding of the unconstitutionality of Section 304 on all three grounds urged by respondents and the United States in the instant case would not run afoul of that principle of economy. For the three grounds are closely related and reveal varying facets, exhibited from different aspects, of the same underlying evil. Thus,

the legislative assessment of penalties on particular individuals, the Bill of Attainder, is characterized by the want of procedural guarantees of fairness required by due process of law. And the same element of unfairness attaches to legislative intervention, in particular cases, in the sphere of exercise of the executive's powers of appointment and removal.

It is of paramount importance for the defining of the rights of federal employees, or indeed any persons, to be free of deprivations inflicted by obviously discriminatory and arbitrary legislative action that Section 304 be held to be repugnant to the Due Process clause of the Fifth Amendment. While unlike the Fourteenth Amendment, the Fifth Amendment does not expressly prohibit legislative action which denies the equal protection of the laws to any person, this Court has indicated that the Fifth Amendment affords protection against Congressional action which involves "discrimination of such injurious character as to bring into operation the due process clause". *Currin* v. *Wallace*, 306 U. S. 1, 14. See also *Hirabayashi* v. *U. S.*, 320 U. S. 81, 100.

Two judges of the Court below, Judges Madden and Jones, held that Section 304 violated the Fifth Amendment on the ground that it denies to respondents the opportunity available to all other citizens of seeking and holding a public office, and prescribes a special rule to be followed in the case of the named individuals, which is not applicable to any other persons or class of persons. Although Chief Judge Whaley and Judge Littleton thought it unnecessary to pass on the constitutionality of Section 304, it is submitted that the ground upon which they rested—that Section 304 did not effect a removal from office or deny a pecuniary obligation to pay for services rendered after November 15th, 1943, but simply prohibited payment from any agency appropriation—is equally a basis for holding that Section 304 is in violation of the Fifth Amendment. For, on their view, Section 304 at least provides that these respondents shall not be permitted to collect their salaries in the same manner as other employees but are put to the

burden of collecting the compensation for their services by bringing suit in the Court of Claims to secure a money judgment so that Congress may pay their compensation by an appropriation for payment of judgments rendered by the Court of Claims, and not by an appropriation to any agency for salaries. Although it is difficult to accept this interpretation of Section 304 in the light of its history, it is equally difficult to discern why the section, even when viewed in that narrow perspective is not repugnant to the Fifth Amendment. For the elements of gross unfairness and unreasonable discrimination are equally present when named Federal employees are singled out for treatment different from that accorded all other Federal employees as a mark of legislative disapproval of the views which these employees happen to entertain. A holding that Section 304 is repugnant to the Fifth Amendment would serve to make clear that Congress may not arbitrarily single out specified individuals, because of the opinions which they hold, and discriminate against them, whether by removing them from office and disqualifying them from holding future office, or by imposing on them onerous and burdensome methods, applicable to no other persons, for collecting their compensation.

CONCLUSION.

For the reasons stated in the briefs of the respondents and of the United States, and for the reasons stated herein, it is respectfully submitted that Section 304 is unconstitutional as a Bill of Attainder, an improper encroachment on the Executive branch of the Government, and a deprivation of due process of law in violation of the Fifth Amendment and that the judgments of the Court below should be affirmed on these grounds.

Respectfully submitted,

NATIONAL LAWYERS GUILD,

By MARTIN POPPER,
Executive Secretary.

p. 16, 18, 14

SUPREME COURT OF THE UNITED STATES.

Nos. 809, 810, 811.—October Term, 1945.

809	United States, Petitioner, *vs.* Robert Morss Lovett.	On Writs of Certiorari to the Court of Claims.
810	United States, Petitioner, *vs.* Goodwin B. Watson.	
811	United States, Petitioner, *vs.* William E. Dodd, Jr.	

[June 3, 1946.]

Mr. Justice Black delivered the opinion of the Court.

In 1943 the respondents, Lovett, Watson, and Dodd, were and had been for several years working for the Government. The Government agencies which had lawfully employed them were fully satisfied with the quality of their work and wished to keep them employed on their jobs. Over the protest of those employing agencies, Congress provided in Section 304 of the Urgent Deficiency Appropriation Act of 1943, by way of an amendment attached to the House bill, that after November 15, 1943, no salary or compensation should be paid respondents out of any monies then or thereafter appropriated except for services as jurors or members of the armed forces, unless they were prior to November 15, 1943 again appointed to jobs by the President with the advice and consent of the Senate.[1] 57 Stat. 431, 450. Notwithstanding the Congressional enactment, and the failure of the President to reappoint

[1] Section 304 provides: "No part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act, or (2) which is now, or which is hereafter made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States, shall be used, after November 15, 1943, to pay any part of the salary, or other compensation for the personal services, of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has been appointed by the President, by and with the advice and consent of the Senate: *Provided*, That this section shall not operate to deprive any such person of payment for leaves of absence or salary, or of any refund or reimbursement, which have accrued prior to November 15, 1943: *Provided further*, That this section shall not operate to deprive any such

respondents, the agencies kept all the respondents at work on their jobs for varying periods after November 15, 1943; but their compensation was discontinued after that date. To secure compensation for this post-November 15th work, respondents brought these actions in the Court of Claims. They urged that Section 304 is unconstitutional and void on the grounds that: (1) The Section, properly interpreted, shows a Congressional purpose to exercise the power to remove executive employees, a power not entrusted to Congress but to the Executive Branch of Government under Article II, Sections 1, 2, 3, and 4 of the Constitution; (2) the Section violates Article I, Section 3, Clause 9, of the Constitution which provides that "no bill of attainder or ex post facto law shall be passed"; (3) the Section violates the Fifth Amendment, in that it singles out these three respondents and deprives them of their liberty and property without due process of law. The Solicitor General, appearing for the Government, joined in the first two of respondents' contentions but took no position on the third. House Resolution 386, 89 Cong. Rec. 10882, and Public Law 249, 78th Congress, authorized a special counsel to appear on behalf of the Congress. This counsel denied all three of respondents' contentions. He urged that Section 304 was a valid exercise of Congressional power under Article I, Section 8, Clause 1; Section 8, Clause 18; and Section 9, Clause 7 of the Constitution, which Sections empower Congress "to lay and collect taxes . . . to pay the Debts, and provide for the Common Defense and General Welfare of the United States," and "to make all Laws which shall be necessary and proper for carrying into Execution . . . . all . . . . Powers, vested by the Constitution in the Government of the United States, or in any Department or Office thereof," and provide that "No money shall be drawn from the Treasury, but in consequence of Appropriations made by Law." Counsel for Congress also urged that Section 304 did not purport to terminate respondents' employment. According to him, it merely cut off respondents' pay and deprived governmental agencies of any power to make enforceable contracts with respondents for any

person of payment for services performed as a member of a jury or as a member of the armed forces of the United States nor any benefit, pension, or emolument resulting therefrom.

As we shall point out, the President signed the bill because he had to do so since the appropriated funds were imperatively needed to carry on the war. He felt, however, that section 304 of the bill was unconstitutional, and failed to reappoint respondents.

further compensation. The contention was that this involved simply an exercise of Congressional power over appropriations, which according to the argument, are plenary and not subject to judicial review. On this premise counsel for Congress urged that the challenge of the constitutionality of Section 304 raised no justiciable controversy. The Court of Claims entered judgments in favor of respondents. Some of the judges were of the opinion that Section 304, properly interpreted, did not terminate respondents' employment, but only prohibited payment of compensation out of funds generally appropriated, and that, consequently, the continued employment of respondents was valid, and justified their bringing actions for pay in the Court of Claims. Other members of the Court thought Section 304 unconstitutional and void, either as a bill of attainder, an encroachment on exclusive executive authority, or a denial of due process. — Court of Claims —. We granted certiorari because of the manifest importance of the questions involved.

In this Court the parties and counsel for Congress have urged the same points as they did in the Court of Claims. According to the view we take we need not decide whether Section 304 is an unconstitutional encroachment on executive power or a denial of due process of law, and the section is not challenged on the ground that it violates the First Amendment. Our inquiry is thus confined to whether the actions in the light of a proper construction of the Act present justiciable controversies and if so whether Section 304 is a bill of attainder against these respondents involving a use of power which the Constitution unequivocally declares Congress can never exercise. These questions require an interpretation of the meaning and purpose of the section, which in turn requires an understanding of the circumstances leading to its passage. We, consequently, find it necessary to set out these circumstances somewhat in detail.

In the background of the statute here challenged lies the House of Representatives' feeling in the late thirties that many "subversives" were occupying influential positions in the Government and elsewhere and that their influence must not remain unchallenged. As part of its program against "subversive" activities the House in May 1938 created a Committee on Un-American Activities, which became known as the Dies Committee after its Chairman, Congressman Martin Dies. H. R. 1282, 83 Cong. Rec. 7568-7587. This Committee conducted a series of investigations

and made lists of people and organizations it thought "subversive." See e. g.: H. Rep. No. 1, 77th Cong., 1st Sess.; H. Rep. No. 2748, 77th Cong., 2d Sess. The creation of the Dies Committee was followed by provisions such as Section 9A of the Hatch Act, 53 Stat. 1148, 1149, and Sections 15(f) and 17(b) of the Emergency Relief Appropriations Act of 1941, 54 Stat. 611, which forbade the holding of a federal job by anyone who was a member of a political party or organization that advocated the overthrow of our Constitutional form of Government in the United States. It became the practice to include a similar prohibition in all appropriations acts, together with criminal penalties for its violation.[2] Under these provisions the Federal Bureau of Investigation began wholesale investigations of federal employees, which investigations were financed by special Congressional appropriations. 55 Stat. 292, 56 Stat. 468, 482. Thousands were investigated.

While all this was happening Mr. Dies on February 1, 1943, in a long speech on the floor of the House attacked thirty-nine named Government employees as "irresponsible, unrepresentative, crackpot, radical bureaucrats" and affiliates of "communist front organizations." Among these named individuals were the three respondents. Congressman Dies told the House that respondents, as well as the other thirty-six individuals he named were because of their beliefs and past associations unfit to "hold a government position" and urged Congress to refuse "to appropriate money for their salaries." In this connection he proposed that the Committee on Appropriations "take immediate and vigorous steps to eliminate these people from public office." 89 Cong. Rec. 474, 479, 486. Four days later an amendment was offered to the Treasury-Post Office Appropriation Bill which provided that "no part of any appropriation contained in this Act shall be used to pay the compensation of" the thirty-nine individuals Dies had attacked. 89 Cong. Rec. 645. The Congressional Record shows that this amendment precipitated a debate that continued for several days. *Id.* 645-742. All of those participating agreed that the "charges" against the thirty-nine individuals were serious. Some wanted to accept Congressman Dies' statements as sufficient proof of "guilt", while others referred to such proposed

2 55 Stat. 92, Sec. 5; 55 Stat. 265, Sec. 504; 55 Stat. 303, Sec. 7; 55 Stat. 366, Sec. 10; 55 Stat. 408, Sec. 3; 55 Stat. 446, Sec. 5; 55 Stat. 466, Sec. 704; 55 Stat. 492, House Doc. 833, 77th Cong., 2nd Sess.

action as "legislative lynching." *Id.* at 651, smacking "of the procedure in the French Chamber of Deputies, during the Reign of Terror." *Id.* at 659. The Dies charges were referred to as "indictments"; and many claimed this made it necessary that the named federal employees be given a hearing and a chance to prove themselves innocent. *Id.* at 771. Congressman Dies then suggested that the Appropriations Committee "weigh the evidence and . . . take immediate steps to dismiss these people from the federal service." *Id.* at 651. Eventually a resolution was proposed to defer action until the Appropriations Committee could investigate, so that accused federal employees would get a chance to prove themselves "innocent" of communism or disloyalty, and so that each "man would have his day in court," and "There would be no star chamber proceedings." *Id.* at 711 and 713; but see *id.* at 745. The resolution which was finally passed authorized the Appropriations Committee acting through a special subcommittee ". . . to examine into any and all allegations or charges that certain persons in the employ of the several executive departments and other executive agencies are unfit to continue in such employment by reason of their present association or membership or past association or membership in or with organizations whose aims or purposes are or have been subversive to the Government of the United States." *Id.* at 734, 742. The Committee was to have full plenary powers, including the right to summon witnesses and papers, and was to report its "findings and determination" to the House. It was authorized to attach legislation recommended by it to any general or special appropriation measure, notwithstanding general House rules against such practice. *Id.* at 734. The purpose of the resolution was thus described by the Chairman of the Committee on Appropriations in his closing remarks in favor of its passage: "The third and the really important effect is that we will expedite adjudication and disposition of these cases and thereby serve both the accused and the Government. These men against whom charges are pending are faced with a serious situation. If they are not guilty they are entitled to prompt exoneration; on the other hand, if they are guilty, then the quicker the Government removes them the sooner and the more certainly will we protect the Nation against sabotage and fifth-column activity." *Id.* at 741.

After the resolution was passed a special subcommittee of the Appropriations Committee held hearings in secret executive ses-

sion. Those charged with "subversive" beliefs and "subversive" associations were permitted to testify, but lawyers including those representing the agencies by which the accused were employed were not permitted to be present. At the hearings, committee members, the committee staff, and whatever witness was under examination were the only ones present. The evidence, aside from that given by the accused employees, appears to have been largely that of reports made by the Dies Committee, its investigators, and Federal Bureau of Investigation reports, the latter being treated as too confidential to be made public.

After this hearing the subcommittee's reports and recommendations were submitted to the House as part of the Appropriation Committee's report. The subcommittee stated that it had regarded the investigations "as in the nature of an inquest of office" with the ultimate purpose of purging the public service of anyone found guilty of "subversive activity." The committee, stating that "subversive activity" had not before been defined by Congress or by the courts formulated its own definition of "subversive activity" which we set out in the margin.[3] Respondents Watson, Dodd, and Lovett were, according to the subcommittee, guilty of having engaged in "subversive activity within the definition adopted by the Committee." H. Rep. No. 448, 78th Cong., 1st Sess., 5-7,9. The ultimate finding and recommendation as to respondent Watson, which was substantially similar to the findings with respect to Lovett and Dodd, read as follows: "Upon consideration of all the evidence, your committee finds that the membership and association of Dr. Goodwin B. Watson with the organizations mentioned, and his views and philosophies as expressed in various statements and writings, constitute subversive activity within the definition adopted by your committee, and that he is, therefore, unfit for the present to continue in Government employment." House Report No. 448, 78th Congress, 1st Session, 6. As to Lovett the Committee further reported that it had rejected a "strong appeal" from the Secretary of the Interior for permission to retain Lovett in Government service, because as the Committee stated, it could not "escape the conclusion that

[3] "Subversive activity in this country derives from conduct intentionally destructive of or inimical to the Government of the United States—that which seeks to undermine its institutions, or to distort its functions, or to impede its projects, or to lessen its efforts, the ultimate end being to overturn it all. Such activity may be open and direct as by effort to overthrow, or subtle and indirect as by sabotage." H. Rep. No. 448, 78th Cong., 1st Sess., p. 5.

this official is unfit to hold a position with the Government by reason of his membership, association, and affiliation with organizations whose aims and purposes are subversive to the Government of the United States." *Id.* at 12.

Section 304 was submitted to the House along with the Committee Report. Congressman Kerr who was chairman of the subcommittee stated that the issue before the House was simply: ". . . whether or not the people of this country want men who are not in sympathy with the institutions of this country to run it." He said further: ". . . These people have no property rights in these offices. One Congress can take away their rights given them by another." 89 Cong. Rec. 4583. Other members of the House during several days of debate bitterly attacked the measure as unconstitutional and unwise. *Id.* at 4482-4487, 4546-4556, 4581-4605. Finally Section 304 was passed by the House.

The Senate Appropriation Committee eliminated Section 304 and its action was substained by the Senate. 89 Cong. Rec. 5024. After the first conference report which left the matter still in disagreement the Senate voted 69 to 0 against the conference report which left Section 304 in the bill. The House however insisted on the amendment and indicated that it would not approve any appropriation bill without Section 304. Finally after the fifth conference report showed that the House would not yield the Senate adopted Section 304. When the President signed the bill he stated: "The Senate yielded, as I have been forced to yield, to avoid delaying our conduct of the war. But I cannot so yield without placing on record my view that this provision is not only unwise and discriminatory, but unconstitutional." H. Doc. 264, 78th Cong., 1st Sess.

I.

In view of the facts just set out we cannot agree with the two judges of the Court of Claims who held that Section 304 required "a mere stoppage of disbursing routine, nothing more," and left the employer governmental agencies free to continue employing respondents and to incur contractual obligations by virtue of such continued work which respondents could enforce in the Court of Claims. Nor can we agree with counsel for Congress that the Section did not provide for the dismissal of respondents but merely forbade governmental agencies to compensate respondents for their work or to incur obligations for such compensation at

any and all times. We therefore cannot conclude, as he urges, that Section 304 is a mere appropriation measure, and that since Congress under the Constitution has complete control over appropriations, a challenge to the measure's constitutionality does not present a justiciable question in the courts, but is merely a political issue over which Congress has final say.

We hold that the purpose of Section 304 was not merely to cut off respondents' compensation through regular disbursing channels but permanently to bar them from government service, and that the issue of whether it is constitutional is justiciable. The Section's language as well as the circumstances of its passage which we have just described show that no mere question of compensation procedure or of appropriations was involved, but that it was designed to force the employing agencies to discharge respondents and to bar their being hired by any other governmental agency. Cf. *United States* v. *Dickerson*, 310 U. S. 554. Any other interpretation of the Section would completely frustrate the purpose of all who sponsored Section 304, which clearly was to "purge" the then existing and all future lists of Government employees of those whom Congress deemed guilty of "subversive activities" and therefore "unfit" to hold a federal job. What was challenged therefore is a statute which, because of what Congress thought to be their political beliefs, prohibited respondents from ever engaging in any government work, except as jurors or soldiers. Respondents claimed that their discharge was unconstitutional; that they consequently rightfully continued to work for the Government and that the Government owes them compensation for services performed under contracts of employment. Congress has established the Court of Claims to try just such controversies. What is involved here is a Congressional proscription of Lovett, Watson and Dodd, prohibiting their ever holding a Government job. Were this case to be not justiciable, Congressional action, aimed at three named individuals, which stigmatized their reputation and seriously impaired their chance to earn a living, could never be challenged in any court. Our Constitution did not contemplate such a result. To quote Alexander Hamilton, ". . . a limited constitution . . . [is] one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the

medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." Federalist Paper No. 78.

II.

We hold that Section 304 falls precisely within the category of Congressional actions which the Constitution barred by providing that "No Bill of Attainder or *Ex Post Facto* Law shall be passed." In *Cummings* v. *Missouri*, 4 Wall. 277, 323, this Court said, "A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties." The Cummings decision involved a provision of the Missouri Reconstruction Constitution which required persons to take an Oath of Loyalty as a prerequisite to practicing a profession. Cummings, a Catholic Priest, was convicted for teaching and preaching as a minister without taking the oath. The oath required an applicant to affirm that he had never given aid or comfort to persons engaged in hostility to the United States and had never "been a member of or connected with any order, society, or organization inimical to the government of the United States . . ." In an illuminating opinion which gave the historical background of the Constitutional prohibition against bills of attainder, this Court invalidated the Missouri Constitutional provision both because it constituted a bill of attainder and because it had an *ex post facto* operation. On the same day the Cummings case was decided, the Court, in *Ex parte Garland*, 4 Wall. 333, also held invalid on the same grounds an Act of Congress which required attorneys practicing before this Court to take a similar oath. Neither of these cases has ever been overruled. They stand for the proposition that legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution. Adherence to this principle requires invalidation of Section 304. We do adhere to it.

Section 304 was designed to apply to particular individuals.[4] Just as the statute in the two cases mentioned it "operates as

[4] This is of course one of the usual characteristics of bills of attainder. See Wooddeson, Law Lectures: A Systematical View of the Laws of England (1792), No. 41, 622.

a legislative decree of perpetual exclusion" from a chosen vocation. This permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type. It is a type of punishment which Congress has only invoked for special types of odious and dangerous crimes, such as treason, 18 U. S. C. 2; acceptance of bribes by members of Congress, 18 U. S. C. 199, 202, 203; or by other government officials, 18 U. S. C. 207; and interference with elections by Army and Navy officers, 18 U. S. C. 59.

Section 304, thus, clearly accomplishes the punishment of named individuals without a judicial trial. The fact that the punishment is inflicted through the instrumentality of an Act specifically cutting off the pay of certain named individuals found guilty of disloyalty, makes it no less galling or effective than if it had been done by an Act which designated the conduct as criminal.[5] No one would think that Congress could have passed a valid law, stating that after investigation it had found Lovett, Dodd, and Watson "guilty" of the crime of engaging in "subversive activities," defined that term for the first time, and sentenced them to perpetual exclusion from any government employment. Section 304, while it does not use that language, accomplishes that result. The effect was to inflict punishment without the safeguards of a judicial trial and "determined by no previous law or fixed rule."[6] The Constitution declares that that cannot be done either by a state or by the United States.

Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty,

[5] See Cummings v. Missouri, *supra*, 4 Wall. at 325, 329; see also Fletcher v. Peck, 6 Cranch. 87, 138-139; Burgess v. Salmon, 97 U. S. 381, 185.

[6] See dissent of Mr. Justice Miller in Cummings v. Missouri, *supra*, 4 Wall. at 388; see also Wooddeson, *supra*, at 624, 638 et seq. Section 304 has all the characteristics of bills of attainder even as they are set out by Justice Miller's dissent except the corruption of blood. 4 Wall. at 387. The American precedents do not consider corruption of blood a necessary element. Originally a judgment of death was necessary to attaint and the consequences of attainder were forfeiture and corruption of blood. Coke, First Institute (on Littleton) (Thomas Ed. 1818) Vol. III, 559, 563, 565. If the judgment was lesser punishment than death there was no attaint and the bill was one of pains and penalties. Practically all the American precedents are bills of pains and penalties. See Thompson, Anti-Loyalist Legislation During the American Revolution (1908) 3 Ill. L. Rev. 81, 153 *et passim.*; John C. Hamilton, History of the Republic of the United States ((1859) Vol. III, 23-40. The Constitution in prohibiting bills of attainder undoubtedly included bills of pains and penalties as the majority in the Cummings case held.

or property of particular named persons, because the legislature thinks them guilty of conduct which deserves punishment. They intended to safeguard the people of this country from punishment without trial by duly constituted courts. See *Duncan* v. *Kahanamoku*, Nos. 14 and 15, decided Feb. 25, 1946. And even the courts to which this important function was entrusted, were commanded to stay their hands until and unless certain tested safeguards were observed. An accused in court must be tried by an impartial jury, has a right to be represented by counsel, he must be clearly informed of the charge against him, the law which he is charged with violating must have been passed before he committed the act charged, he must be confronted by the witnesses against him, he must not be compelled to incriminate himself, he cannot twice be put in jeopardy for the same offense, and even after conviction no cruel and unusual punishment can be inflicted upon him. See *Chambers* v. *Florida*, 309 U. S. 227, 235-238. When our Constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of free men they envisioned. And so they proscribed bills of attainder. Section 304 is one. Much as we regret to declare that an Act of Congress violates the Constitution, we have no alternative here.

Section 304 therefore does not stand as an obstacle to payment of compensation to Lovett, Watson, and Dodd. The judgment in their favor is

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of these cases.

Mr. Justice FRANKFURTER, whom Mr. Justice REED joins, concurring.

Nothing would be easier than personal condemnation of the provision of the Urgency Deficiency Appropriation Act of 1943 here challenged. § 304, 57 Stat. 431, 450.[1] But the judicial function exacts considerations very different from those which may

[1] "SEC. 304. No part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act, or (2) which is now, or which is hereafter made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States, shall be used, after November 15, 1943, to pay any part of the salary, or other compensation for the personal services of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has

determine a vote in Congress for or against a measure. And what may be decisive for a Presidential disapproval may not at all satisfy the established criteria which alone justify this Court's striking down an act of Congress.

It is not for us to find unconstitutionality in what Congress enacted although it may imply notions that are abhorrent to us as individuals or policies we deem harmful to the country's well-being. Although it was proposed at the Constitutional Convention to have this Court share in the legislative process, the Framers saw fit to exclude it. And so "it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, Kansas & Texas Ry. Co.* v. *May*, 194 U. S. 267, 270. This admonition was uttered by Mr. Justice Holmes in one of his earliest opinions and it needs to be recalled whenever an exceptionally offensive enactment tempts the Court beyond its strict confinements.

Not to exercise by indirection authority which the Constitution denied to this Court calls for the severest intellectual detachment and the most alert self-restraint. The scrupulous observance, with some deviations, of the professed limits of this Court's power to strike down legislation has been, perhaps, the one quality the great judges of the Court have had in common. Particularly when congressional legislation is under scrutiny, every rational trail must be pursued to prevent collision between Congress and Court. For Congress can readily mend its ways, or the people may express disapproval by choosing different representatives. But a decree of unconstitutionality by this Court is fraught with consequences so enduring and far-reaching as to be avoided unless no choice is left in reason.

The inclusion of § 304 in the Appropriation Bill undoubtedly raises serious constitutional questions. But the most fundamental principle of constitutional adjudication is not to face constitutional questions but to avoid them, if at all possible. And so the "Court developed for its own governance in cases confessedly

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been appointed by the President, by and with the advice and consent of the Senate: *Provided*, That this section shall not operate to deprive any such person of payment for leaves of absence or salary, or of any refund or reimbursement, which have accrued prior to November 15, 1943: *Provided further*, That this section shall not operate to deprive any such person of payment for services performed as a member of a jury or as a member of the armed forces of the United States nor any benefit, pension, or emolument resulting therefrom."

within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." Brandeis, J., concurring, in *Ashwander* v. *Valley Authority*, 297 U. S. 288, 341, at 346. That a piece of legislation under scrutiny may be widely unpopular is as irrelevant to the observance of these rules for abstention from avoidable adjudications as that it is widely popular. Some of these rules may well appear over-refined or evasive to the laity. But they have the support not only of the profoundest wisdom. They have been vindicated, in conspicuous instances of disregard, by the most painful lessons of our constitutional history.

Such are the guiding considerations enjoined by constitutional principles and the best practice for dealing with the various claims of unconstitutionality so ably pressed upon us at the bar.

The Court reads § 304 as though it expressly discharged respondents from office which they held and prohibited them from holding any office under the Government in the future. On the basis of this reading the Court holds that the provision is a bill of attainder in that it "inflicts punishment without a judicial trial", *Cummings* v. *Missouri*, 4 Wall. 277, 323, and is therefore forbidden by Article I, Section 9 of the Constitution. Congress is said to have inflicted this punishment upon respondents because it disapproved the beliefs they were thought to hold. Such a colloquial treatment of the statute neglects the relevant canons of constitutional adjudication and disregards those features of the legislation which call its validity into question on grounds other than inconsistency with the prohibition against bills of attainder. To characterize an act of Congress as a bill of attainder readily enlists, however, the instincts of a free people who are committed to a fair judicial process for the determination of issues affecting life, liberty, or property and naturally abhor anything that resembles legislative determination of guilt and legislative punishment. As I see it, our duty precludes reading § 304 as the Court reads it. But even if it were to be so read the provision is not within the constitutional conception of a bill of attainder.

Broadly speaking two types of constitutional claims come before this Court. Most constitutional issues derive from the broad standards of fairness written into the Constitution (*e. g.* "due process," "equal protection of the laws," "just compensation"),

and the division of power as between States and Nation. Such questions, by their very nature, allow a relatively wide play for individual legal judgment. The other class gives no such scope. For this second class of constitutional issues derives from very specific provisions of the Constitution. These had their source in definite grievances and led the Fathers to proscribe against recurrence of their experience. These specific grievances and the safeguards against their recurrence were not defined by the Constitution. They were defined by history. Their meaning was so settled by history that definition was superfluous. Judicial enforcement of the Constitution must respect these historic limits.

The prohibition of bills of attainder falls of course among these very specific constitutional provisions. The distinguishing characteristic of a bill of attainder is the substitution of legislative determination of guilt and legislative imposition of punishment for judicial finding and sentence. "A bill of attainder, by the common law, as our fathers imported it from England and practiced it themselves, before the adoption of the Constitution, was an act of sovereign power in the form of a special statute . . . by which a man was pronounced guilty or attainted of some crime, and punished by deprivation of his vested rights, without trial or judgment *per legem terrae*." Farrar, *Manual of the Constitution* (1867) 419. And see 2 Story, *Commentaries on the Constitution* (5th ed., 1891) 216; 1 Cooley, *Constitutional Limitations* (8th ed., 1927) 536. It was this very special, narrowly restricted, intervention by the legislature, in matters for which a decent regard for men's interests indicated a judicial trial, that the Constitution prohibited. It must be recalled that the Constitution was framed in an era when dispensing justice was a well-established function of the legislature. The prohibition against bills of attainder must be viewed in the background of the historic situation when moves in specific litigation that are now the conventional and, for the most part, the exclusive concern of courts were commonplace practices. See *Calder* v. *Bull*, 3 Dall. 386; *Wilkinson* v. *Leland*, 2 Pet. 627, 660; *Baltimore and Susquehanna Railroad Co.* v. *Nesbit*, 10 How. 395; Pound, *Justice According to Law*, II (1914) 14 Col. Rev. 1-12; Woodruff, *Chancery in Massachusetts* (1899) 1 L. Q. Rev. 370. *Cf. Sinking-Fund Cases*, 99 U. S. 700. Bills of attainder were part of what now are staple judicial functions which legislatures then exercised. It was this part of their recognized

authority which the Constitution prohibited when it provided that "No Bill of Attainder . . . shall be passed." Section 304 lacks the characteristics of the enactments in the Statutes of the Realm and the Colonial Laws that bear the hallmarks of bills of attainder.

All bills of attainder specify the offense for which the attainted person was deemed guilty and for which the punishment was imposed. There was always a declaration of guilt either of the individual or the class to which he belonged. The offense might be a pre-existing crime or an act made punishable *ex post facto*. Frequently a bill of attainder was thus doubly objectionable because of its *ex post facto* features. This is the historic explanation for uniting the two mischiefs in one clause—"No Bill of Attainder or *ex post facto* Law shall be passed." No one claims that § 304 is an *ex post facto* law. If it is in substance a punishment for acts deemed "subversive" (the statute, of course, makes no such charge) for which no punishment had previously been provided, it would clearly be *ex post facto*. Therefore, if § 304 is a bill of attainder it is also an *ex post facto* law. But if it is not an *ex post facto* law, the reasons that establish that it is not are persuasive that it cannot be a bill of attainder. No offense is specified and no declaration of guilt is made. When the framers of the Constitution proscribed bills of attainder, they referred to a form of law which had been prevalent in monarchical England and was employed in the colonies. They were familiar with its nature; they had experienced its use; they knew what they wanted to prevent. It was not a law unfair in general, even unfair because affecting merely particular individuals, that they outlawed by the explicitness of their prohibition of bills of attainder. "Upon this point a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349. Nor should resentment against an injustice displace controlling history in judicial construction of the Constitution.

Not only does § 304 lack the essential declaration of guilt. It likewise lacks the imposition of punishment in the sense appropriate for bills of attainder. The punishment imposed by the most dreaded bill of attainder was of course death; lesser punishments were imposed by similar bills more technically called bills of pains and penalties. The Constitution outlaws this entire category of punitive measures. *Fletcher* v. *Peck*, 6 Cranch. 87, 138; *Cummings* v. *Missouri*, 4 Wall. 277. The amount of punishment is immaterial to the classification of a challenged statute. But punishment is a prerequisite.

Punishment presupposes an offense, not necessarily an act previously declared criminal, but an act for which retribution is exacted. The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation. A man may be forbidden to practice medicine because he has been convicted of a felony, *Hawker* v. *New York*, 170 U. S. 189, or because he is no longer qualified, *Dent* v. *West Virginia*, 129 U. S. 114. "The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact." *Cummings* v. ~~Virginia~~ Missouri, 4 Wall. 277, 320.

Is it clear then that the respondents were removed from office, still accepting the Court's reading of the statute, as a punishment for past acts? Is it clear, that is, to that degree of certitude which is required before this Court declares legislation by Congress unconstitutional? The disputed section does not say so. So far as the House of Representatives is concerned, the Kerr Committee, which proposed the measure, and many of those who voted in favor of the Bill (assuming it is appropriate to go behind the terms of a statute to ascertain the unexpressed motive of its members), no doubt considered the respondents "subversive" and wished to exclude them from the Government because of their past associations and their present views. But the legislation upon which we now pass judgment is the product of both Houses of Congress and the President. The Senate five times rejected the substance of § 304. It finally prevailed, not because the Senate joined in an unexpressed declaration of guilt and retribution for it, but because the provision was included in an important appropriation bill. The stiffest interpretation that can be placed upon the Senate's action is that it agreed to remove the respondents from office (still assuming the Court's interpretation of § 304), without passing any judgment on their past conduct or present views.

Section 304 became law by the President's signature. His motive in allowing it to become law is free from doubt. He rejected the notion that the respondents were "subversive," and explicitly stated that he wished to retain them in the service of the Government. H. Doc. No. 264, 78th Cong., 1st Sess. Histori-

cally, Parliament passed bills of attainder at the behest of the monarch. See Adams, *Constitutional History of England* (Rev. ed., 1935) 228-29. The Constitution, of course, provides for the enactment of legislation even against disapproval by the executive. But to hold that a measure which did not express a judgment of condemnation by the Senate and carried an affirmative disavowal of such condemnation by the President constitutes a bill of attainder disregards the historic tests for the determining what is a bill of attainder. At the least, there are such serious objections to finding § 304 a bill of attainder that it can be declared unconstitutional only by a failure to observe that this Court reaches constitutional invalidation only through inescapable necessity. "It must be evident to anyone that the power to declare a legislative enactment void is one which the judge, conscious of the fallability of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility." 1 Cooley, *Constitutional Limitations* (8th ed., 1927) 332.

But even if it be agreed, for purposes of characterizing the deprivation of the statute as punishment, that the motive of Congress was past action of the respondents, presumed motive cannot supplant expressed legislative judgment. "The expectations of those who sought the enactment of legislation may not be used for the purpose of affixing to legislation when enacted a meaning which it does not express." *United States* v. *Goelet*, 232 U. S. 293, 298. Congress omitted from § 304 any condemnation for which the presumed punishment was a sanction. Thereby it negatived the essential notion of a bill of attainder. It may be said that such a view of a bill of attainder offers Congress too easy a mode of evading the prohibition of the Constitution. Congress need merely omit its ground of condemnation and legislate the penalty! But the prohibition against a "Bill of Attainder" is only one of the safeguards of liberty in the arsenal of the Constitution. There are other provisions in the Constitution, specific and comprehensive, effectively designed to assure the liberties of our citizens. The restrictive function of this clause against bills of attainder was to take from the legislature a judicial function which the legislature once possessed. If Congress adopted, as it did, a form of statute so lacking in any pretension to the very quality which gave a bill of attainder its significance, that a declaration of guilt under circumstances which made its determination grossly

unfair, it simply passed an act which this Court ought not to denounce as a bill of attainder. And not the less so because Congress may have been conscious of the limitations which the Constitution has placed upon it against passing bills of attainder. If Congress chooses to say that men shall not be paid, or even that they shall be removed from their jobs, we cannot decide that Congress also said that they are guilty of an offense. And particularly we cannot so decide as a necessary assumption for declaring an act of Congress invalid. Congress has not legislated that which is attributed to it, for the simple fact is that Congress has said nothing. The words Congress used are not susceptible of being read as a legislative verdict of guilt against the respondents no matter what dictionary, or what form of argumentation, we use as aids.

This analysis accords with our prior course of decision. In *Cummings* v. *Missouri*, *supra*, and Ex parte *Garland*, 4 Wall. 333, the Court dealt with legislation of very different scope and significance from that now before us. While the statutes in those cases did not condemn or punish specific persons by name they proscribed all guilty of designated offenses. Refusal to take a prescribed oath operated as an admission of guilt and automatically resulted in the disqualifying punishment. Avoidance of legislative proscription for guilt under the *Cummings* and *Garland* statutes required positive exculpation. That the persons legislatively punished were not named was a mere detail of identification. Congress and the Missouri legislature, respectively, had provided the most effective method for insuring identification. These enactments followed the example of English bills of attainder which condemned a named person and "his adherents." Section 304 presents a situation wholly outside the ingredients of the statute that furnished the basis for the *Cummings* and *Garland* decisions.[2]

While § 304 is not a bill of attainder, as the gloss of history defines that phrase in the Constitution, acceptance of the Court's reading of § 304 would raise other serious constitutional questions. The first in magnitude and difficulty derives from the constitutional distribution of power over removal. For about a century this Court astutely avoided adjudication of the power of

[2] Even against the holding that such enactments were bills of attainder, Mr. Justice Miller wrote the powerful dissent concurred in by Mr. Chief Justice Chase, Mr. Justice Swayne, and Mr. Justice Davis. 4 Wall. 333, 382.

control as between Congress and the Executive of those serving in the Executive branch of the Government "until it should be inevitably presented." *Myers* v. *United States*, 272 U. S. 52, 173. The Court then gave the fullest consideration to the problem. The case was twice elaborately argued here and was under consideration for nearly three years. So far as the issues could be foreseen they were elaborately dealt with in opinions aggregating nearly two hundred pages. Within less than a decade an opinion of fifteen pages largely qualified what the *Myers* case had apparently so voluminously settled. *Humphreys Executor* v. *United States*, 295 U. S. 602. This experience serves as a powerful reminder of the Court's duty so to deal with congressional enactments as to avoid their invalidation unless a road to any other decision is barred.

The other serious problem the Court's interpretation of § 304 raises is that of due process. In one aspect this is another phase of the constitutional issue of the removal power. For if § 304 is to be construed as a removal from office, it cannot be determined whether singling out three government employees for removal violated the Fifth Amendment until it is decided whether Congress has a removal power at all over such employees and how extensive it is. Even if the statute be read as a mere stoppage of disbursement the question arises whether Congress can treat three employees of the Government differently from all others. But that question we do not have to answer. In any event respondents are entitled to recover in this suit and their remedy—a suit in the Court of Claims—is the same whatever view one takes of the legal significance of § 304. To be sure, § 304 also purports to prescribe conditions relating to other future employment of respondents by the Government. This too is a question not now open for decision. Reemployment by any agency of the Government, or the desire for reemployment, is not now in controversy, "and consequently the subject may well be postponed until it actually arises for decision." *Wilson* v. *New*, 243 U. S. 332, 354. The "great gravity and delicacy" of this Court's function in passing upon the validity of an act of Congress is called into action only when absolutely necessary. *Steamship Co.* v. *Emigration Commissioners*, 113 U. S. 33, 39. It should not be exercised on the basis of imaginary and non-existent facts. See Brandeis, J., concurring, in *Ashwander* v. *Valley Authority*, *supra*, at 338-45.

Since it is apparent that grave constitutional doubts will arise if we adopt the construction the Court puts on § 304, we ought to follow the practice which this Court has established from the time of Chief Justice Marshall. The approach appropriate to such a case as the one before us was thus summarized by Mr. Justice Holmes in a similar situation: "... the rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act. Even to avoid a serious doubt the rule is the same. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407, 408. *United States* v. *Standard Brewery*, 251 U. S. 210, 220. *Texas* v. *Eastern Texas R. R. Co.* v. *Johnson*, 264 U. S. 375, 390. Words have been strained more than they need to be strained here in order to avoid that doubt. *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401, 402." *Blodgett* v. *Holden*, 275 U. S. 142, 148 (concurring). "'When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.' *Crowell* v. *Benson*, 285 U. S. 22, 62." Brandeis, J., concurring, in *Ashwander* v. *Tennessee Valley Authority*, *supra*, at 348.

We are not faced inescapably with the necessity of adjudicating these serious constitutional questions. The obvious, or at the least, the one certain construction of § 304 is that it forbids the disbursing agents of the Treasury to pay out of specifically appropriated moneys sums to compensate respondents for their services. We have noted the cloud cast upon this interpretation by manifestations by committees and members of the House of Representatives before the passage of this section. On the other hand, there is also much in the debates not only in the Senate but also in the House which supports the mere fiscal scope to be given to the statute. That such a construction is tenable settles our duty to adopt it and to avoid determination of constitutional questions of great seriousness.

Accordingly, I feel compelled to construe § 304 as did Mr. Chief Justice Whaley below, 45 F. Supp. —, whereby it merely prevented the ordinary disbursal of money to pay respondents' salaries. It did not cut off the obligation of the Government to pay for services rendered and the respondents are, therefore, entitled to recover the judgment which they obtained from the Court of Claims.